IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

## Original, No.

IN THE MATTER OF THE EASTERN CHEROKEES,
PETITIONERS.

## MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Come now The Eastern Cherokees residing west of the Mississippi River, by Joseph D. Sullivan, as attorney-in-fact, and John B. Daish, as attorney, (each acting under and by virtue of certain powers of attorney, hereto annexed as Exhibits A and B, same being dated at Moody Springs, the 16th day of May, 1910) and pray that the Court will grant leave to file the Petition for a writ of mandamus hereto annexed and that in the meantime the Court will make such order as will protect the rights of the petitioners in the premises until the court can hear and determine the matters in said petition.

JOSEPH D. SULLIVAN,
*Attorney-in-fact.*
JOHN B. DAISH, *Attorney.*

## EXHIBIT A.

### Power of Attorney.

Know all men by these presents, That we, the undersigned, acting for ourselves and for and in behalf of the Eastern Cherokees as a whole residing west of the Mississippi River, being duly empowered to act in that behalf, do hereby nominate, constitute and appoint Joseph D. Sullivan, of the City of Washington, District of Columbia, as attorney-in-fact for the Eastern Cherokees residing west of the Mississippi River hereby giving to him full power and authority to act in respect to any and all matters in, of and concerning the litigation now and heretofore pending in the Court of Claims being entitled Eastern Cherokees *vs.* United States, No. 23214; and the said Joseph D. Sullivan is hereby authorized to sign for and in behalf of the said Eastern Cherokees the name of said nation, the members thereof and the Catowah Society to any or all papers or documents requiring the signature of said nation, Society or parties, said papers being necessary for the purpose of securing the correction, modification and reversal of the decree made in said cause.

Witness our hands and seals at Moody Spring this sixteenth day of May, 1910.

Head Captain, John McIntosh. [SEAL.]
Second Captain, Jim Hildebrand. [SEAL.]
W. H. Foreman. [SEAL.]
John Hicks. [SEAL.]
Eli Snell. [SEAL.]
Sam Boney. [SEAL.]
Sec'y, Thomas Tucker. [SEAL.]

Witness:

Isaac Tucker.
Ned Dreadfulwater.

Signed and Witnessed in my Presence.

[NOTARIAL SEAL.] Darius E. Ward,
*Notary Public.*

My Commission Expires (second term) November 27th, 1910.

## EXHIBIT B.

### POWER OF ATTORNEY.

Know all men by these presents, That we, the undersigned, acting for ourselves and for and in behalf of the Eastern Cherokees as a whole, residing west of the Mississippi River, being duly empowered to act in that behalf do hereby nominate, constitute and appoint John B. Daish of the City of Washington, District of Columbia as attorney of said Eastern Cherokees, to institute, conduct and prosecute any and all litigation and proceedings, as he may be advised, in connection with or growing out of the correction, modification or reversal of a decree lately passed in a case entitled Eastern Cherokees *vs.* The United States, being No. 23214 in the Court of Claims.

Witness our hands and seals at Moody Spring this sixteenth day of May, 1910.

Head Captain, JOHN MCINTOSH. [SEAL.]
Second Captain, JIM HILDEBRAND. [SEAL.]
WILLIAM H. FOREMAN. [SEAL.]
JOHN HICKS. [SEAL.]
ELI SNELL. [SEAL.]
SAM BONEY. [SEAL.]
Sec'y, THOMAS TUCKER. [SEAL.]

Witness:
ISAAC TUCKER.
NED DREADFULWATER.

Signed and Witnessed in my presence.
[NOTARIAL SEAL.] DARIUS WARD.
*Notary Public.*

My Commission Expires (second term) November 27th, 1910.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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## Original, No.

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IN THE MATTER OF THE EASTERN CHEROKEES,
PETITIONERS.

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## BRIEF IN SUPPORT OF RIGHT TO MANDAMUS.

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### Statement of Facts.

The facts of the present controversy are brief:

Pursuant to an enabling act, jurisdiction of certain controversies between the Eastern Cherokees and the Cherokee Nation on the one hand and the United States on the other was conferred on the Court of Claims. That court found in favor of the Cherokees (40 Ct. Cl., 252) and entered a decree in their favor. Said decree awarded $1,111,284.70 to said Cherokees, "to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

Upon appeal, this court affirmed the decree of the Court of Claims (202 U. S., 101), with the modification of the

above (inasmuch as the language was, in the opinion of this court, liable to misconstruction) so as "to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–'6 and 1846, and exclusive of the Old Settlers."

Such modification was upon the filing of the mandate made, but subsequently, and without other or further directions by this court, the Court of Claims changed, altered, and modified its decree by which distribution is now to be made to "all such individual Eastern Cherokee Indians by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee Tribe of Indians at the date of the treaties of 1835–'6 and 1846, or are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation."

Aside from the manifest differences in the present decree from that prescribed by the mandate of this court, there is apparent one important and vital change, which affects each and every member of the Eastern Cherokees, to wit, the method of distribution. By the original decree of the Court of Claims the distribution was to be *per stirpes;* by the affirmance of this court the distribution was to be *per stirpes;* by the present decree of the Court of Claims the distribution is to be *per capita.*

To secure a distribution *per stirpes,* as ordered by this court, the petitioners ask a rule for mandamus to compel the Court of Claims to obey the mandate of this court.

## Points and Authorities.

### I.

This court has jurisdiction to issue a writ of mandamus in this case because—

(*a*) It has appellate jurisdiction of the matters and things involved in and determined by the cases—

*In re* Massachusetts, 197 U. S., 428, 488.
*In re* Glazer, 198 U. S., 171, 173.
*Ex parte* Bradstreet, 6 Pet., 774.

(*b*) Having appellate jurisdiction, under the thirteenth section of the judiciary act of September 24, 1789 it has authority and "power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the United States."

U. S. *v.* Addison, 22 How., 174, 183.
Am. Cons. Co. *v.* Railroad, 148 U. S., 372, 379.
Marbury *v.* Madison, 1 Cranch, 137, 176.
McCluny *v.* Silliman, 2 Wheat., 369, 370.
*Ex parte* Newman, 14 Wall., 152, 165.
*In re* Blake, 175 U. S., 114, 118.

The present provision of the Revised Statutes, section 688, "modified the form, without removing the limitation as to the courts to which and the officers to whom it [mandamus] may issue."

*In re* Green, 141 U. S., 325, 326.

### II.

Mandamus is the proper remedy where a mandate of this court has been disobeyed.

Perkins *v.* Fourniquet, 14 How., 328.
*Re* Washington & G. R. Co., 140 U. S., 95.
Gaines *v.* Rugg, 148 U. S., 243.

But not where there has been no disobedience of the mandate, for the inferior court is justified in considering and deciding questions left open by the mandate and opinion of the court.

*Ex parte* Union Steamboat Co., 178 U. S., 317, 319.

The duty of the inferior court, and the remedy upon the failure of the court to act properly was succinctly set forth in *Ex parte* Union Steamboat Company (178 U. S., 317, 318), as follows:

> "The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice Baldwin in an early case upon that subject (Sibbald *v.* United States, 12 Pet., 488, 492): 'Whatever,' said he, 'was before the court, and is disposed of is considered as finally settled.' The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. * * * If the special mandate directed by the 24th section [of the judiciary act] is not obeyed or executed, then the general power given to 'all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,' by the 14th section of the judiciary act, fairly arises, and a mandamus or other appropriate writs will go." although an appeal will sometimes lie. Perkins *v.* Fourniquet, 14 How., 328, 330; Milwaukee and M. R. Co. *v.* Soutter, 2 Wall., 440, 443. See also Boyce *v.* Grundy, 9 Pet., 275; *Ex parte* Dubuque and P. R. Co., 1 Wall., 69; Durant *v.* Essex Co., 101 U. S., 555; *Re* Washington and G. R. Co., 140 U. S., 91; City Bank *v.* Hunter, 152 U. S., 512; *Re* City Nat. Bank, 153 U. S., 246; *Re* Sanford

Fork & Tool Co., 160 U. S., 247; *Re* Potts, 166 U. S., 263.

* * * * * * *

"The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court (*Re* Sanford Fork & Tool Co., 160 U. S., 247, 256); and the opinion of this court may be consulted to ascertain exactly what was decided and settled. (West *v.* Brashear, 13 Pet., 51; Wayne County Supers. *v.* Kennicott, 94 U. S., 498; Gaines *v.* Rugg, 148 U. S., 228, 238, 244; *Re* Sanford Fork & Tool Co., 160 U. S., 247, 256.)"

In the present case all matters involved, including the method and plan of distribution of the fund, were finally settled by the mandate of this court; and the mandate is in conformity with the opinion of this court. The decree of the Court of Claims of May 18, 1905, was affirmed with a clear modification.

The original decree of the Court of Claims read:

"The remainder to be distributed to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

The modification under the mandate of this court required—

"the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835–6 and 1846; and exclusive of the Old Settlers."

This modification is clear, distinct, certain, and positive; no discretion was by the mandate left to the Court of Claims and no questions were left open by this court. In truth

and in fact such a modification was made as directed by this court, but after conforming to said mandate, the Court of Claims has since modified the decree not only contrary to the express provision of the mandate but has also modified a part of the decree which was specifically by said mandate affirmed.

The original decree of the Court of Claims provided for a *per stirpes* distribution to the Cherokees. The mandate affirmed such distribution but excluded participation therein by the Old Settlers. The present decree of the Court of Claims (and the roll predicated thereon) prescribes a *per capita* distribution as of May 28, 1906.

The last-mentioned decree, therefore, aside from changing the method of making the roll, changes the plan of distribution as directed by the mandate of this court.

In conclusion, it is submitted, that the present is a proper case in which this court should issue a rule for mandamus, the court having jurisdiction so to do, and the inferior court (the Court of Claims) having disobeyed the mandate of this court in that said court has modified its decree otherwise than as directed by the mandate.

Respectfully submitted,

JOHN B. DAISH,
*Attorney, The Eastern Cherokees, Petitioners.*

WASHINGTON, *May* 28, 1910.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

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## Original, No.

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IN THE MATTER OF THE EASTERN CHEROKEES,
PETITIONERS.

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## PETITION FOR WRIT OF MANDAMUS.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Come now The Eastern Cherokees residing west of the Mississippi River, by their attorney-in-fact, Joseph D. Sullivan, acting in accordance with and pursuant to a certain power of attorney, dated at Moody Springs, the 16th day of May, 1910, a copy of which is hereto attached as Exhibit No. 1, and it is prayed may be taken and read as a part hereof and respectfully shows unto your Honors:

1. That there was lately pending in this Honorable Court, to wit, October Term, 1905, three cases with captions as follows:

The United States, Appellant, *vs.* The Cherokee Nation (No. 346); The Eastern Cherokees, Appellant, *vs.* The Cherokee Nation and the United States (No. 347); The Cherokee Nation, Appellant, *vs.* The United States (No. 348).

2. That the petitioners herein, The Eastern Cherokees residing west of the Mississippi River, appear through their Head Captain, John McIntosh, Second Captain, Jim Hildebrand, William H. Foreman, John Hicks, Eli Snell, Sam Boney, and Thomas Tucker, Secretary, who represent themselves as individuals and also The Eastern Cherokees as a whole residing west of the Mississippi River, petitioners herein; that at a duly called convention held on the 16th day of May, 1910, the petitioners authorized such proceedings as their said counsel might be advised in connection with or relation to the correction, modification, or reversal of a certain decree entered by the Court of Claims in a cause entitled "The Eastern Cherokees *vs.* The United States," said cause being No. 23,214 in the said Court of Claims and being the case mentioned in paragraph 1 hereof. The Eastern Cherokees, Appellant, *vs.* Cherokee Nation and The United States, No. 347, October Term, 1905.

That The Eastern Cherokees residing west of the Mississippi River are too numerous to individually appear as parties to a proceeding; that in accordance with custom, they act through their duly authorized representatives above mentioned who are empowered to represent The Eastern Cherokees as a whole residing west of the Mississippi River.

3. That it was determined by this Honorable Court on April 30, 1906, in the cases mentioned in paragraph 1 of this petition that a certain decree of the Court of Claims should be affirmed with a certain modification, as appears from the mandate from this Honorable Court filed in the said Court of Claims on May 15, 1906, a copy of which is attached hereto as Exhibit No. 2 and it is prayed may be taken and read as a part hereof.

4. That the decree of May 18, 1905, of the said the Court of Claims provided in the fourth paragraph thereof, among other things, as follows:

> "The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such

counsel fees as may be chargeable against the same under the provisions of the contract with The Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this Court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:—

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

5. That pursuant to said mandate of this Honorable Court, the said the Court of Claims modified its original decree in said cases on May 28, 1906, in the language following:

"These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to the Court that by the said mandate it is provided that the second subdivision of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the Treaties of 1835–6 and 1846, exclusive of the Old Settlers, it is therefore so ordered and decreed this 28th day of May, 1906."

6. That thereafter by order entered April 28th, 1907, the said Court of Claims further modified its final decree of May 18, 1905, as modified May 28, 1906, as follows:

> "It further appearing to the Court that the lands disposed of by the Eastern Cherokees under the Treaties of 1835–6 and 1846, were owned by them as a community, and the rights arising under said treaties, as established by the decree of May 28, 1906, accrued to the said Eastern Cherokees as communal owners of said land; and it further appearing from the report of Special Agent Guion Miller, accompanying the reference of the Secretary of the Interior of February 20, 1907, above referred to that a *per stirpes* distribution to the Eastern Cherokees who were parties to the Treaties of 1835–6 and 1846 is impracticable; it is therefore further ordered that the commissioner hereinafter named shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee Tribe of Indians at the date of the Treaty of 1835–6 and 1846, or are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation; provided further, that said persons, pursuant to the notices of the Commissioner of Indian Affairs, bearing dates of August 20, 1906, and February 1, 1907, have filed applications for a share of such fund with the Commissioner of Indian Affairs, or shall file such applications with the commissioner hereinafter named on or before the 31st day of August, 1907."

7. That it was also determined by this Honorable Court on April 30, 1906, as appears from the opinion in said cases (202 U. S. 101, 130), that the judgment in favor of the Cherokees should be "subject to the limitation that the amount thereof should be paid to the Secretary of Interior to be distributed directly to the parties entitled to it."

That in accordance with said limitation the said the Court of Claims on May 28, 1906, directed the Secretary of Interior to prepare or to have prepared a list or roll of Cherokees entitled to share in the amount of the said judgment.

That thereafter, contrary to said limitation, the said the Court of Claims, by order entered the 29th day of April, 1907, provided "that [the] direction of the decree of the Court" (Court of Claims) "of May 28, 1906, which provides that the Secretary of the Interior shall prepare, or cause to be prepared, a list or roll of all persons entitled to share in the fund arising from said decree, and to make distribution of said fund be, and the same is hereby vacated."

That thereafter on the 29th day of April, 1907, the said the Court of Claims, by order, appointed a special commissioner to prepare a roll of persons entitled under the terms and conditions of the decrees and orders of the Court of Claims to share in the fund arising under said judgment.

That thereafter on the 29th day of April, 1907, the said the Court of Claims by decree provided as follows:

> "It is further ordered that all the expenses, incurred in carrying into effect the provsions of this decree, together with the expenses already incurred in making publication of said order of March 5, 1907, shall, upon the proper certificate made under oath by said commissioner, and duly approved by the court, be paid by the Secretary of the Treasury out of the appropriation made by the act of Congress of June 30, 1906, to pay said judgment in favor of the Eastern Cherokee Indians as aforesaid."

8. That thereafter, to wit, on March 7, 1910, the said the Court of Claims denied certain exceptions to enrollment made for and on behalf of certain Eastern Cherokees; that said exceptions included, with respect to certain applicants, whether or not said applicants were entitled to participate in the fund arising from said judgment upon the ground that such parties would not be included in a *per stirpes*

distribution; that is to say, said exceptions raised the question whether or not certain persons on said roll "were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or (to) the legal representatives of such individuals" [decree of Court of Claims, May 18, 1905] and "exclusive of the Old Settlers" [modification of this Honorable Court of April 30, 1906].

That thereafter, to wit, on March 7, 1910, the said the Court of Claims approved a certain roll, being a list of persons entitled to distribution of the fund arising under said judgment; that said roll was prepared by the direction of said Court so that a *per capita* distribution of said fund as of May 28, 1906, shall be made.

9. The petitioners are advised that the mandate of this Honorable Court, the same being filed in the Court of Claims on the 15th day of May, 1906, is final and the effect thereof is to make all matters and things within the scope of said mandate *res adjudicata*.

Petitioners are further advised that it was the duty of the said the Court of Claims to obey the said mandate in each and every respect; and that when the said the Court of Claims, subsequent to said mandate provided by order for a *per capita* distribution of the fund arising from the judgment awarded, said order was in violation and disobedience of said mandate; and further, that when the said the Court of Claims, appointed a special commissioner to prepare a roll of persons entitled to participate in the distribution of said fund, the said Court of Claims acted in disobedience of said mandate which provided that said roll should be prepared by the Secretary of the Interior or by him caused to be prepared; and in respect to the parties preparing said roll, your petitioners aver that had said roll been prepared by the Secretary of the Interior or under his authority and direction in accordance with the mandate of this Honorable

Court, there would have accrued to your petitioners far less costs, charges, fees and expenses for preparing said roll and your petitioners aver that from said fund there has already been paid as and for costs, fees, charges and expenses for and in connection with said roll a large sum of money; and petitioners are advised that said costs, fees, charges and expenses for said purpose in accordance with the orders of the said, the Court of Claims, is without authority of law and is in disobedience of the mandate of this Honorable Court.

Petitioners are informed that the said roll prepared in accordance with the orders of the said Court of Claims now contains the names of numerous persons not entitled under the mandate aforesaid to participate in said fund, with the result that the shares of your petitioners, The Eastern Cherokees residing west of the Mississippi River are much lessened; that petitioners are advised that the rights of The Eastern Cherokees to the fund ($1,111,284.70) accrued to them, as individuals, parties to the treaties of 1835-6 and 1846 at said time; and that said rights vested in certain Eastern Cherokees, including those whose names are set out above, on March 14, 1903, in accordance with the mandate of this honorable court; and that by reason of the disobedience of said mandate, as hereinbefore set forth, and the roll prepared and approved as stated, the said vested rights of said parties are now denied.

Wherefore, the premises considered, your petitioners pray:

1. For a rule on the said the Court of Claims and the judges thereof to show cause why a writ of mandamus should not issue compelling them to obey the mandate aforesaid;

2. And for a writ of mandamus directed to the said the Court of Claims and the judges thereof commanding them to obey the mandate aforesaid;

3. And for such other and further relief as the court may deem proper in the premises.

THE EASTERN CHEROKEES,
By JOSEPH D. SULLIVAN,
*Attorney-in-Fact.*

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Albert C. Wells, a notary public in and for the District of Columbia, Joseph D. Sullivan, and made oath in due form of law that he is the attorney-in-fact for the petitioners and is acquainted with the facts alleged in the foregoing petition and same are true to the best of his knowledge, information and belief.

JOSEPH D. SULLIVAN.

Subscribed and sworn to before me this 28th day of May, 1910.

[NOTARIAL SEAL.] ALBERT C. WELLS,
*Notary Public, D. C.*

## EXHIBIT No. 1.

### POWER OF ATTORNEY.

Know all men by these presents, That we, the undersigned, acting for ourselves and for and in behalf of the Eastern Cherokees as a whole residing west of the Mississippi River, being duly empowered to act in that behalf, do hereby nominate, constitute, and appoint Joseph D. Sullivan, of the city of Washington, District of Columbia, as attorney-in-fact for the Eastern Cherokees residing west of the Mississippi River, hereby giving to him full power and authority to act in respect to any and all matters in, of, and concerning the litigation now and heretofore pending in the Court of Claims, being entitled Eastern Cherokees *vs.* United States, No. 23214, and the said Joseph D. Sullivan is hereby authorized to sign for and in behalf of the said Eastern Cherokees the name of said nation, the members thereof, and the Catowah Society to any or all papers or documents requiring the signature of said nation, society, or parties, said papers being necessary for the purpose of securing the correction, modification and reversal of the decree made in said cause.

Witness our hands and seals at Moody Springs this sixteenth day of May, 1910.

Head Captain, JOHN MCINTOSH. [SEAL.]
Second Captain, JIM HILDEBRAND. [SEAL.]
W. H. FOREMAN. [SEAL.]
JOHN HICKS. [SEAL.]
ELI SNELL. [SEAL.]
SAM BONEY. [SEAL.]
Sec'y, THOMAS TUCKER. [SEAL.]

Witnesses:

ISAAC TUCKER.
NED DREADFULWATER.

Signed and witnessed in my presence.

[NOTARIAL SEAL.] DARIUS E. WARD,
*Notary Public.*

My commission expires (second term) November 27, 1910.

EXHIBIT No. 2.

COURT OF CLAIMS.

No. 23199.

THE CHEROKEE NATION
*vs.*
THE UNITED STATES.

No. 23212.

THE EASTERN CHEROKEES
*vs.*
THE UNITED STATES.

No. 23214.

THE EASTERN CHEROKEES
*vs.*
THE UNITED STATES and THE CHEROKEE NATION.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the annexed (paged from 1 to 4, inclusive) is a true copy of the mandate of the Supreme Court of the United States, filed in this office in the above-entitled causes on May 15, 1906.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington city this 24th day of May, A. D. 1910.

[Seal of Court of Claims.]

(Signed) JOHN RANDOLPH,
*Assistant Clerk Court of Claims.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America, to the Honorable the Judges of the Court of Claims, Greeting:

Whereas, lately in the Court of Claims before you or some of you, in causes between The Cherokee Nation and The United States, No. 23199; The Eastern Cherokees and The United States and The Cherokee Nation, No. 23214; and The Eastern and Emigrant Cherokees and The United States, No. 23212, wherein the decree of the said Court of Claims entered in said causes on the 18th day of May, A. D. 1905, is in the following words, viz:

> "The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edgar Smith, and Frederick D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney General Pradt, on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, The Cherokee Nation, do have and recover of and from the United States as follows:
>
> "Item 1. The sum of..... $2,125.00
>
> "With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.
>
> "Item 2. The sum of..... $1,111,284.70
>
> "With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

"Item 3. The sum of..... $432.28

"With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.

"Item 4. The sum of..... $20,406.25

"With interest thereon from July 1, 1903, to date of payment.

the proceeds of said several items, however, to be paid and distributed as follows:

"The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the 'Cherokee school fund' now in the possession of the United States and held by them as trustees.

"The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said Nation entitled to receive it.

"The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee national fund,' now in the possession of the United States and held by them as trustees.

"The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter al-

lowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

"So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same, upon the making of an appropriation by Congress to pay this judgment.

"The allowance of fees and expenses by this court, under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

"By the COURT."

as by the inspection of the transcript of the record of the said Court of Claims, which was brought into the Supreme Court of the United States by virtue of separate appeals taken by The United States, The Eastern Cherokees, and The Cherokee Nation, respectively, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said Supreme Court, on the said transcript of record on separate appeals, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the second subdivision of the fourth paragraph of the decree of the said Court of Claims in this cause be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-36 and 1846; and exclusive of the Old Settlers and, as so modified, be, and the same is hereby, affirmed.

APRIL 30, 1906.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of May, in the year of our Lord one thousand nine hundred and six.

JAMES H. MCKENNEY,
*Clerk of the Supreme Court*
*of the United States.*

Office Supreme Court, U. S.
FILED.
NOV 16 1910
JAMES H. McKENNEY,

# SUPREME COURT OF THE UNITED STATES.

October term, 1910. Original No. 15.

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IN THE MATTER OF THE EASTERN CHEROKEES, PETITIONERS.

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*RESPONSE OF THE COURT OF CLAIMS AND THE JUDGES THEREOF TO THE RULE TO SHOW CAUSE WHY THE PRAYER OF THE PETITIONERS FOR A MANDATE AGAINST SAID COURT SHOULD NOT BE GRANTED.*

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On May 31, 1910, a motion asking leave to file a petition for a writ of mandamus against the Court of Claims was allowed by the Supreme Court to be filed, and thereafter, on October 17, 1910, the petition herein, as appears from the notice to show cause, was filed, and on October 20, 1910, was served by counsel representing the petitioners in open court.

Therefore, in response to said notice to show cause why a writ of mandamus should not issue to compel the Court of Claims to obey the mandate of the Supreme Court, said court and the judges thereof say that they deny each and every paragraph of the petition wherein the averments may be material to the questions involved, except as hereinafter stated, that is to say:

(1) They deny that the petitioners represent the Eastern Cherokees residing west of the Mississippi River or elsewhere, or that they had any authority to employ counsel for such purpose.

(2) They deny having disobeyed the mandate of said court in respect to the persons to whom the distribution of the money arising from the judgment of the court in the case of *United States* v. *The Cherokee Nation, appellant*, No. 346; *The Eastern Cherokees, appellant*, v. *Cherokee Nation and the United States*, No. 347; *The Cherokee Nation* v. *The United States*, No. 348, appealed from the Court of Claims, should be made, which decree, with certain modifications hereinafter referred to, was affirmed by the Supreme Court (202 U. S., 101, 130). Upon the contrary, the modification directed by the Supreme Court was incorporated in the decree as directed, as admitted by the petitioners for said mandate to show cause as aforesaid.

(3) The court and judges further deny that the subsequent so-called modification of the decree referred to in said petition in any way changed the decree contrary to its original intention or did otherwise than construe the decree for the guidance of the Secretary of the Interior and the special agent appointed by him to make the roll of those entitled to share in said judgment; and to the construc-

tion thus given no exceptions were taken by anyone until the filing of the petition for mandate herein to show cause.

(4) The court and judges admit that subsequently to the mandate of the Supreme Court and at the written request of the Secretary of the Interior and sundry other persons who petitioned therefor, as well as at the request of the counsel engaged in said causes, they vacated the order—not directly involved in the appeal—directing the Secretary of the Interior to prepare a roll of those entitled to share in the proceeds of the judgment, and employed Guion Miller, esq., who had theretofore been in the employ of said Secretary for the same purpose, to prepare the roll under the supervision of the court; and the roll was prepared accordingly and approved by the court, and the money arising from said judgment was long prior to October 17, 1910, the date of the filing of said petition for said mandate to show cause, distributed and paid to practically all of those on said roll, so that of the 30,827 enrolled only 313 remained unpaid, as we are advised by said commissioner, who was also intrusted, under the order of the court, with the delivery of the warrants issued by the Treasury Department to the parties so enrolled, respectively. Since which time 44 additional payments have been made, leaving 269 unpaid on October 28, 1910.

To be more specific in response to the rule to show cause the attention of the court is called to their language by the late Chief Justice Fuller in 202 United States, 101, 120, where, in the beginning, it is said:

"Of the four items of the account to be allowed, only one, that for $1,111,284.70, need be considered here.

"1. The correctness of the account is conceded, and the question is whether the United States were properly held liable therefor," etc.

The only other questions involved were as to whether or not interest should be allowed on said sum and as to whom the same should be paid.

The material portion of the decree of the court from which the appeal was taken, as set forth in the petition for said mandate, is as follows:

"The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

By article 15, treaty of 1835 (7 Stat. L., 478, 485), it was expressly provided that, after deducting the amounts actually expended as therein set forth, "the balance whatever the same may be shall be

equally divided between all the people belonging to the Cherokee Nation east according to the census just completed," etc., while by article 9, treaty of 1846 (9 Stat. L., 871, 875), it was provided that "the United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835." Furthermore, by the act of September 30, 1850 (9 Stat. L., 544, 556), Congress, in making an appropriation to pay the amount of a like fund found due by the Senate as umpire under article 2 of the supplemental treaty of 1836 (7 Stat. L., 488), added this proviso: "That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due per capita." The amount appropriated by that act and by the act February 27, 1851 (9 Stat. L., 570, 572), amounting in the aggregate to a million dollars, was, as set forth in Finding XLI of the original cases in this court (40 C. Cls., 252, 281), paid to the Cherokees per capita. The question of how the payment was to be made was also referred to the Attorney-General, and that officer held that the distribution should be made per capita (5 Opins. Atty. Gen., 320, 329), and we may add that such has been the uniform ruling of the courts respecting communal property, and, in the recent case of *Fleming* v. *McCurtain* (215 U. S., 56), wherein letters patent had issued pursuant to the treaty of Dancing Rabbit Creek of September 27, 1830 (7 Stat. L., 333), conveying certain lands to the Choctaw Indians in fee simple to them and their descendants to inure to them while they should exist as a nation and live thereon, was by the court held to be a grant to the Choctaw Nation, to be administered by it as such, and that such conveyance did not create a trust for the individuals then comprising the nation.

In giving force to the treaties, acts of Congress, and opinion of the Attorney-General this court, in its opinion (40 C. Cls., 330, 331, 332), referring to the persons to whom distribution should be made, said:

"The persons to whom distribution of this fund of $1,111,284.70, with accrued interest, would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the Western and Eastern Cherokees were placed on the same footing with regard to all lands east of the Mississippi and with regard to the funds derived from them. It follows necessarily that each and all of the present communal owners, whether on the east or the west of the Mississippi, and whether the descendants of Eastern or Western Cherokees, have the same individual interest in the fund and will be entitled to like amount *per capita*.

* * * * * * *

"That the amount of $1,111,284.70, together with interest thereon from June 12, 1838, to a day when the Secretary of the Interior shall be ready to make payments, as hereinafter provided, nevertheless be paid directly to communal owners, being Cherokees by blood, whether on the eastern or western side of the Mississippi River, and to that end the Secretary of the Interior is authorized to appoint one or more commissioners to proceed to the Cherokee country and to the country of the Cherokees residing east of the Mississippi to ascertain

and report to the Secretary the facts necessary for the formation of rolls of all Cherokees by blood, the expenses of making out and preparing such rolls to be a charge upon and paid out of the fund awarded by the decree.

"The decree will also provide for the payment of the fund to the parties *per capita*, the charge of distribution likewise to be a charge upon the fund."

On appeal, the Supreme Court, at page 130, said:

"We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it; but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to 'the Eastern and Western Cherokees,' are perhaps liable to misconstruction, although limited to those 'who were parties either to the treaty of New Echota as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River.' This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the old settlers."

It will be observed that in the modification so directed to be made the words "or to the legal representatives of such individuals" (in the original decree) were omitted, clearly showing, we think, that the Supreme Court had in view the distribution *per capita* and not *per stirpes*, and this is made clearer by the language of the court in next to the last paragraph of its opinion where, in response to the contention that the Eastern and Emigrant Cherokees, numbering about 4,500, residing mostly east, should have set apart to them one-fourth of the whole sum recovered as their distributive share, said: "We think they are only entitled to receive the *per capita* payment with the Eastern Cherokees and should obtain that payment accordingly."

May 28, 1906, the Court of Claims modified its decree as ordered in the mandate of the Supreme Court providing that "the distribution of the fund described in item *two* of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835–36 and 1846, and exclusive of the old settlers."

As before stated, the words "or to the legal representatives of such individuals" in the original decree were omitted by the Supreme Court and also by this court in its modification; and following said modification the court "ordered and decreed that the Secretary of the Interior prepare, or cause to be prepared, a list or roll of all persons coming within the said description entitled to share in the distribution of said fund; and in preparing the said list or roll of such persons, the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851, upon which the *per capita* payment to the Eastern Cherokees was made, and make such distribution in pursuance of article 9 of the treaty of 1846," to which reference was heretofore made.

Thereafter in February, 1907, the special agent, Guion Miller, appointed by the Secretary to prepare said roll under his supervision,

reported to the Commissioner of Indian Affairs the difficulties which he encountered in making the roll upon a *per stirpes* basis and otherwise, and asked that the Court of Claims be requested to give further instructions in the matter, which was done by the Secretary under date of February 20, 1907.

In response to the letter of the Secretary of the Interior calling attention to the difficulties which the special agent had encountered in making said roll and the report of said special agent pointing out the difficulties, to wit—"First. Shall the rolls of 1851 be used as the exclusive basis for the present distribution? Second. Shall the distribution be *per stirpes* or *per capita?* Third. If *per stirpes*, what disposition shall be made of those portions for which there have been no applications?"—the court by way of construing its decree so modified by the mandate of the Supreme Court ordered that the commissioner hereinafter named "shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall further establish the fact that they were members of the Eastern Cherokee tribe of Indians at the date of the treaty of 1835–36 and 1846, or are descendants of such persons, and who shall establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation."

The purpose and intent of the decree, as shown from the language used both in the opinion of the court and the decree as modified in accordance with said mandate, were that as those entitled to share were communal owners they should be enrolled and paid *per capita.*

Thereafter the Secretary of the Interior, by letter under date of April 10, 1907, requested the court to assume the supervision of the making of said roll; and petitions to the same effect being filed by Henry C. Meigs and others, and counsel on both sides consenting thereto, the court thereafter, on April 29, 1907, vacated its order directing the roll to be made under the supervision of said Secretary and assumed the supervision thereof itself, and for that purpose appointed Guion Miller, esq., special commissioner, who had theretofore been employed by the Secretary of the Interior as special agent for the same purpose; and said commissioner, under the direction of the court, and in strict compliance with its decree as aforesaid, did prepare the roll of those entitled to share under and in accordance with the decree, to which roll sundry exceptions were filed, which in the main were overruled by the court; and thereafter, on March 7, 1910, the roll so made as corrected was approved by the court, at which time an opinion was rendered setting forth the basis of the enrollment and the reasons why the payment had to be made per capita, copy of which opinion is attached hereto.

At the time of the approval of said roll and to secure full payment of the amount due to each one so enrolled without having to pass through some intermediary, said Guion Miller was also designated by the court as special commissioner to receive from the Treasury Department all the warrants for the persons so enrolled, respectively, and to visit the various localities where the Indians resided, as he had done in preparing the roll, and to deliver said warrants to the persons entitled thereto, respectively, which was done, as hereinbefore stated, prior to the filing of the petition herein for the mandate.

The court further says, on the authority of the special report of said Guion Miller (made for the information of court) that persons of the same name as those signing the power of attorney authorizing the filing of said petition were enrolled, as were those whom they claim to represent, and have been paid their respective shares, for which they receipted in full.

In conclusion, the court and judges say that the roll of those entitled to share was made in strict compliance with the decree as modified by the mandate of the Supreme Court; that the action of the court in the so-called modification of the decree complained of was intended as a construction of the decree as modified by the mandate of the Supreme Court and to effectuate its purpose; that by reason thereof the persons entitled to share under the decree were enrolled and have been paid *per capita* in strict compliance therewith, as hereinbefore stated. Therefore, the decree so modified by the Supreme Court has performed its office, and the petition for a mandate should be dismissed, which is the prayer of your respondents.

THE COURT OF CLAIMS,

By _____,
*Chief Justice.*

_____,

_____,

_____,

_____,
*Judges.*

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Appendix

# Court of Claims of the United States.

## No. 23214.

(Decided March 7, 1910.)

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THE EASTERN CHEROKEES v. THE UNITED STATES.

PEELLE, Ch. J., delivered the opinion of the court:

The questions now presented relate to the enrollment of those Eastern Cherokee Indians, parties to the treaty of 1835–36 (7 Stat. L., 478, 488) and 1846 (9 Stat. L., 871) who are entitled to share in the money appropriated by Congress to satisfy the judgment and decree entered by the court in favor of the Cherokee Nation May 18, 1905, as modified May 28, 1906, to conform to the mandate of the Supreme Court affirming said judgment, but directing that the distribution be made to said Eastern Cherokees as individuals, exclusive of the Old Settlers.

The special commissioner appointed to make the roll under the decree and instructions of the court, having filed his report herein recommending those who, in his judgment, should be enrolled and those who should not be, and sundry exceptions having been filed by those recommended for rejection, the question is, Shall they be added to the roll?

The original suit arose in the main under the treaty of 1835–36, by the terms of which the parties thereto claimed that the expenses of their removal to the Indian Territory should be borne by the United States.

The findings and opinion relating to the whole case are reported in 40 Court of Claims Reports, page 252, and need not be repeated here.

There were three minor claims in favor of the Cherokee Nation not material here. The claim designated as *item two* in the decree for $1,111,284.70, with interest thereon at 5 per centum from June 12, 1838, to date of payment, is the only one here involved; and in respect thereto the original decree, after providing for the payment of attorneys' fees and the expenses of making the roll, provided: "Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

The case was appealed to the Supreme Court by the respective parties (202 U. S., 101, 130), and in relation to said item *two* the court, among other things, said: "We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee

Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to 'the Eastern and Western Cherokees,' are perhaps liable to misconstruction, although limited to those 'who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River.' This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers."

Hence, upon the coming in of the mandate of the Supreme Court the original decree was modified May 28, 1906, in accordance therewith, directing "the distribution of the fund described in item *two* of said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers."

This is the material part of the final or modified decree directed by the mandate of the Supreme Court respecting the distribution of the fund to the Eastern Cherokees as individuals, the remaining portions thereof, whenever entered, being in the nature of orders directed to the enrolling officer in exemplification of the decree. That is to say, when the Secretary of the Interior was directed to prepare a roll for the distribution of the fund arising from the judgment he was directed to accept as a basis therefor the rolls of 1851, upon which the per capita payments to the Eastern Cherokees had been made.

Thereafter when the Secretary, by letter bearing date April 10, 1907, referred back to the court the matter of making up the roll, with a request that the court supervise the same, and petitions were filed by Henry C. Meigs and others to the same effect, the court vacated its order directing the Secretary of the Interior to prepare the roll and resumed the supervision thereof itself; and for that purpose employed Guion Miller, esq., who had previously been employed by the Secretary of the Interior for the same purpose, at which time he was instructed to enroll all "such individual Eastern Cherokee Indians by blood living on May 28, 1906, as shall establish the fact (1) that they were members of the Eastern Cherokee tribe of Indians at the date of the treaties of 1835–36 and 1846, or are descendants of such persons, and (2) who shall further establish the fact that they have not affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation."

It will be observed that in the original decree the language "or to the legal representatives of such individuals" is omitted in the modification directed by the mandate of the Supreme Court, and was therefore eliminated from the decree in the modification by this court; and even if the language in the original decree could be interpreted to mean anything other than *in loco parentis*, it would be in conflict with the opinion of the court, where, at page 332, the court said: "The decree will also provide for the payment of the fund to the parties *per capita*, the charge of distribution likewise to be a charge upon the fund."

Such also was the opinion of the Attorney-General when the payments were made on the roll of 1851 (5 Op. Atty. Gen., 320, 329). The Attorney-General said: "Under these provisions my opinion is that the distribution is to be made *per capita* and equally among all the individuals residing east, and also all those residing west, other than the 'Old Settlers' found to be in existence at the time of the distribution—each being considered as entitled in his own right, and not by representation of another who is dead; and the payment of these distributive shares should be made to the individual entitled, if of competent age—the shares of children to be paid to the heads of families to which they belong, whether those heads of families be male or female, father or mother, or persons standing *in loco parentis*."

Furthermore, article 15 of the treaty of 1835 (7 Stat. L., 478, 485) provides:

"ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims for spoliations, removal, subsistence, and debts, and claims upon the Cherokee Nation, and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds provided for in the several articles of this treaty, the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east, according to the census just completed, and such Cherokees as have removed west since June, 1833, who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east; they shall also be paid for their improvements, according to their approved value, before their removal, where fraud has not already been shown in their valuation."

And so by article 9 of the treaty of 1846 (9 Stat. L., 871, 875) it is provided that "The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty," etc. Manifestly, by the terms of that article any settlement to be made with the Cherokees was to be subject to the *per capita* division under the treaty of 1835. So, in conformity with the resolution of the United States Senate, acting as umpire under article 2 of the supplemental treaty of 1836 (7 Stat. L., 488), declaring the amount due for the expenses of removal, Congress by the Indian appropriation act of September 30, 1850 (9 Stat. L., 544, 556), appropriated the amount so declared to be due, with this proviso: "That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due *per capita*." The amount so appropriated, together with the larger amount appropriated therefor by the act of February 27, 1851 (9 Stat. L., 570, 572), all which, with interest from June 12, 1838, amounting to nearly $1,000,000, was, as found by the court in the original case (Finding XVI, 40 C. Cls., 281), distributed to said Eastern Cherokees *per capita* in conformity with the treaties of 1835–36 and 1846, as the latter act directed should be done, and also in conformity

with the opinion of the Attorney-General heretofore cited, as directed by section 14 of the act of August 18, 1856 (11 Stat. L., 92).

In communal property each member of the tribe is entitled to an equal share, or, as was observed by the court in the *Whitmire case* (30 C. Cls., 138, 159), the right to payment *per capita* is a recognition of an individual communal interest.

But we need not pursue this branch of the case further, as it must be conceded that by the terms of the treaties, as well as the acts of Congress referred to, the distribution of the fund now in controversy must be to those Eastern Cherokees *per capita*, parties to the treaties of 1835–36 and 1846; and such was the purpose of the decree; and its language, when construed in conformity with the treaties and acts of Congress and opinion of this court in respect thereto, independently of the modification of the decree relating thereto, can have no other meaning, and certainly can not *now*, in view of the language of the Supreme Court to which reference has been made.

Therefore, as the money arising from the decree of the court is to be distributed to those "Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers," the question is what Eastern Cherokees were parties thereto?

Those who separated themselves from the tribe prior to the treaty of 1835 ceased to be members of the tribe under Cherokee law, and they can not now come in and claim enrollment by reason of being descendants of some remote ancestor who was enrolled. The enrollment of a remote ancestor will not operate to preserve the tribal rights of those who separated themselves from the tribe. They must show that they were parties to the treaties of 1835–36 and 1846. That is a condition precedent to their right to share in the distribution of the fund; and by the terms of article 15 of the treaty of 1835, "the balance, whatever the same may be, shall be equally divided between all the people belonging to the Cherokee Nation east according to the census just completed," while article 9 of the treaty of 1846 in express terms provides that "the United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of 29th December, 1835."

Thus there would appear to be no room for controversy but that those on the roll of 1835 and their descendants who have maintained their tribal relations are entitled to the *per capita* distribution of the fund; but it is claimed that the roll of 1835 was incomplete, as only the number of children of those enrolled was given; and so when the time came to distribute the money appropriated by the acts of Congress hereinbefore referred to, it became necessary and the Secretary of the Interior was thereby authorized to make a new roll to ascertain who were entitled to the *per capita* distribution of the money so appropriated.

As a matter of history, which in the main has been incorporated in various public documents, let us examine the basis of the various rolls when made, and the number of Eastern Cherokees heretofore and now enrolled east and west of the Mississippi River, together with the causes of both the increase and decrease in numbers at the respective dates of enrollment.

The heads of families and their children who were on the census roll of 1835, referred to in article 15 of the treaty as "just completed,"

numbered 16,542, as shown by the report (Bureau of Ethnology, vol. 5, p. 289). But in their forced removal west in 1838–39, by reason of the hardships of the journey, change of food and climate, and from other causes, over 1,600 died on the way, while many more died soon after their arrival in the Indian Territory. "Altogether it is asserted, probably with reason, that over 4,000 died as a direct result of the removal." (See Report Bureau of Ethnology, 1897–98, pt. 1, p. 133.)

After their arrival in the Indian Territory, their number being greater than that of the Western Cherokees then in control there of tribal matters, a fierce conflict arose between them as to which faction should rule the tribe. The conflict was fierce, resulting in many deaths and murders, and continued until they became reunited under the treaty of 1846. (See Report Bureau of Ethnology, vol. 5, pp. 292, 294, and 303 to 305.)

At the time of this deportation westward in 1838 there remained east probably something over 1,000 Cherokees, though this is an estimate, as their number is not definitely known. But thirteen years later, when the Chapman roll of 1851 was made of the Eastern Cherokees residing east—that is, in various counties in North Carolina, Tennessee, Alabama, Georgia, Kentucky, and some in the District of Columbia—they numbered 2,134.

As shown by the ethnological report for 1897–98, part 1, page 167, the Chapman roll of 1851 was based upon the census roll of 1835 and the Mullay roll of 1848 and the later census roll of Siler, and was carefully revised, showing the name, age, and sex of each individual enrolled and their relationship to the heads of the group. Neither roll, it is said, varied greatly from the Mullay roll of 1848, which at first contained only 1,513 names, to which were subsequently added more than 600, making the total 2,113. But, as said in the report referred to, "it is not the only time a *per capita* payment has resulted in a sudden increase of the census population."

Notwithstanding the care taken in the preparation of this roll, complaint was made that many Indians who were entitled to be enrolled had been omitted. This led to the act of July 31, 1854, section 8 (10 Stat. L., 333), which was amended by the acts of March 3, 1855, section 4 (10 Stat. L., 700), and August 18, 1856, section 14 (11 Stat. L., 92), whereby the Secretary and afterwards the Commissioner of Indian Affairs were directed to enroll for payment *per capita* all Cherokee Indians residing east of the Mississippi, who had been omitted from the census taken by said agent Siler from any cause whatever; and as a result a large number of families filed claims, including some of those now claiming, but only 88 names were added to the roll, all other claims being rejected. Thus the roll of Eastern Cherokees in the East stood 2,222.

The other roll of Eastern Cherokees residing west of the Mississippi, known as the Drennan roll of 1851, and which with the Chapman roll comprise the pay rolls upon which the distribution of the fund appropriated, as aforesaid, was made, contained the names of 14,094 persons, or, by reason of the excessive number of deaths before referred to, more than 2,400 persons less than were taken west in 1838.

From 1851 (Report of Bureau of Ethnology for 1897–98, pt. 1, p. 151) down to 1900 there was, through the encouragement given thereto by the Cherokee Nation, quite a movement from time to time of Eastern Cherokees in the East to the Indian Territory, thus

diminishing the number east and correspondingly increasing the number west. In addition to this, as shown by the same report at pages 168–172, a considerable number of Cherokees in the East were engaged in the military service and a large number were killed. Also by the same report (pp. 171, 179) it is shown that in 1876 there was a virulent epidemic of smallpox among them and a large number died, and later an epidemic in North Carolina of grip spread through the bands located there and many deaths resulted. But this is not all, for it appears from the same report (pp. 148–150) that the Cherokees in the West were reduced in a marked degree as a result of the civil war. They were not only harassed by both armies engaged in that conflict, but were divided among themselves. As a result, it is stated that "after five years of desolation the Cherokee (in the West) emerged from the war with their numbers reduced from 21,000 to 14,000 and their whole country in ashes." The total number, however, shown by the census roll in 1867, as appears by footnote 2 of the same report at page 150, was only 13,566, and this number, reduced as it was, included the Old Settlers; thus showing that in 1867 the total number of Cherokees in the West, including both the Eastern and the Western Cherokees, was less than the total number of Eastern Cherokees enrolled in the West in 1851.

Now, let us see how this number thirty-five years later corresponds with the number of Cherokees enrolled for the allotment of lands in the Indian Territory by the Commission to the Five Civilized Tribes, known as the "Dawes Commission." This commission enrolled all Cherokees, by blood, including both the Old Settlers and the Eastern Cherokees residing west September 1, 1902, and their corrected roll shows only about 32,500 names.

Thereafter, pursuant to acts of Congress extending the time within which to make the roll to March 4, 1906, there were added all Cherokees, by blood, born between September 1, 1902, and March 4, 1906, numbering 4,991, thus making the total number of all the Cherokees by blood enrolled for allotment about 37,500, which includes the Old Settlers and all the Eastern Cherokees residing with them in the West. (*Final rolls of citizens and freedmen of Five Civilized Tribes in Indian Territory.*) But from this number there should be deducted those enrolled as of September 1, 1902, who, between that date and March 4, 1906, had died, which, according to the mortality tables, would be about 4,000, leaving a total enrollment of Cherokees by blood in the West as of the date of March 4, 1906, of about 33,500. At the time of the making of the rolls in 1851 there were of Eastern or Emigrant Cherokees residing in the West 14,094, and of Old Settlers or Western Cherokees 3,273, or a total of 17,365. Thus, in 1851 the roll of Old Settlers was about 19 per cent of the total number of Cherokees in the West; and assuming that the percentage of Old Settlers was about the same in 1906, there should be deducted from the 33,500 enrolled Cherokees by blood in the West, 6,270, leaving about 26,730 Eastern Cherokees by blood residing in the West March 4, 1906.

The roll prepared by the special commissioner of those living on May 28, 1906 (filed May 28, 1909), since supplemented by other reports making corrections therein and adding thereto other names, show in all now recommended for enrollment 27,381 Eastern Cherokees in the West, which number is slightly in excess of the 26,730 estimated

as enrolled by the Dawes Commission March 4, 1906. The excess may arise from births in the interim, while, on the other hand, that number may have been diminished somewhat by those of more or less mixed blood who affiliated with other tribes or otherwise severed their connection with the Cherokees.

As before stated, the Chapman roll of 1851 contained the names of 2,134 Eastern Cherokees residing in the East, supplemented by the 88 names added by the Secretary of the Interior pursuant to the acts of Congress referred to, making in all 2,222 Cherokees in the East, while the special commissioner has enrolled 3,437, which increase, taking into account reductions from disease, emigration west, and other causes, as before stated, since 1851, would appear reasonable. Hence, the total number of Eastern Cherokees, both east and west of the Mississippi, recommended by the special commissioner for enrollment, is 27,381 west and 3,437 east of the Mississippi, making in all recommended for enrollment 30,818.

In 1882 the agency was reestablished and Agent Hester was authorized to take a census of the Cherokees east of the Mississippi, which he did, and in 1884 he submitted a roll containing the names of 2,956 individuals, of which 1,881 were enrolled from North Carolina, 758 from Georgia, 213 from Tennessee, 71 from Alabama, and 33 from various other places, and, though that roll was approved and certified by the Eastern Cherokee Council, a large number refused to recognize it, claiming that a large number so enrolled had no Cherokee blood. (Report Bureau of Ethnology, 1897–98, pt. 1, p. 176.) This roll, the special commissioner informs us, was of material assistance to him in verifying those on the rolls of 1851.

Hence, with the rolls referred to as a basis for the roll of 1851 and its verification by the Hester roll of 1884, is it not conclusive, in the absence of fraud, that those Eastern Cherokees on the rolls of 1851 who shared in the per capita distribution of a like fund with that now to be distributed are entitled to share? And if so, shall the rolls of 1851 in effect be extended and enlarged by adding to the present roll those who were rejected or for other reasons were not enrolled either in 1835 or 1851? To do so would be fraught with far more serious consequences to those on the rolls of 1851 and their descendants than to those who have been rejected because they or their immediate living ancestors were not on the roll of 1835. Certainly the amount of money to be distributed was an incentive for all those entitled to apply for enrollment, and it appears that many of those who did apply were rejected.

For these reasons the enrolling officer in making up the present roll was directed by the Secretary of the Interior, while under his supervision and control, to accept as a basis the rolls of 1851. It was in effect a revision and extension of the roll of 1835, and showed not only those who were parties to the treaties of 1835–36 and 1846, but their descendants.

The instructions to the enrolling officer to enroll "all such Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee tribe of Indians at the date of the treaty of 1835–36 and 1846, or are descendants of such persons," were not intended to enlarge the modified decree directed by the Supreme Court, but was to effectuate the same by indicating the method by which the enrolling officer was to ascertain who were parties to said treaties. This he could do only

by the census roll of 1835 and the roll of 1851 and subsequent rolls verifying those rolls. Hence, the rolls of 1851 not only contain the names of those Eastern Cherokees, by blood, then living who were parties to the treaties of 1835–36 and 1846, but contain the names of the descendants of those who in the meantime had died. Therefore, accepting the rolls of 1851, prepared by the Secretary of the Interior, and by adding thereto the descendants born between that date and the date of the modified final decree May 28, 1906, and striking therefrom the names of those who have since died or affiliated with other tribes, we have a roll based not only on the best evidence but the only reliable evidence obtainable at this date.

This course is not unusual, for in the *Whitmire case* (30 C. Cls., 180, 184, 186) the court accepted the roll of freedmen known as the corrected "Wallace roll" which was prepared by the Secretary of the Interior, or under his direction, pursuant to statutes directing him to make the *per capita* distribution of the money therein appropriated (25 Stat. L., 609 and 994). The preparation of a roll in that case occupied two years. The Cherokee Nation, against whom the appropriation was by the terms of the act charged, though interested in the number of freedmen to be enrolled, refused to take part, but their refusal, the court held, was "as effective as if it had actually taken part and voluntarily been represented;" and though the Cherokee Nation contended that the roll contained many more names than there were freedmen, still the court accepted it as the best evidence of the number entitled to share in the distribution; and though that roll was less than 20 years old, the court in commenting thereon said: "It may be that the Wallace roll was extended beyond the true number of the persons entitled to be placed thereon; but if it was, the fault was with the Cherokee Nation, who could have contested every name that was placed upon it, and who had the means of exposing every error that may have existed; and the United States spared no pains to make the roll a true exhibit in the case. The court believes that the difficulties in arriving at a true result which existed then will be greatly multiplied now."

And so in the present case the special commissioner, by reason of his conceded ability as a lawyer and his high character as a man, coupled with his experience in the enrollment of Indians under the directions both of this court and the Interior Department, was thereby specially fitted for the work, and, with a large corps of efficient assistants examining and comparing rolls, visiting various localities where the Indians reside, and taking testimony for over three years, he submits for approval a roll containing the names of nearly 31,000 individual Indians whom he recommends as entitled to share. It may be there are others who ought to be enrolled, and that some are on the roll who ought not to be; but it is a significant fact that only three or four exceptions have been filed against the individual Indians recommended for enrollment. On the other hand, of the more that 50,000 who applied that are now recommended for rejection less than one-half have filed exceptions, and many of those have been abandoned or are not now insisted upon. None of them claim that they or their immediate ancestors were enrolled either in 1835 or 1851, except in a few instances, and as to those the special commissioner, by supplemental reports, recommends their enrollment unless they have since affiliated with other tribes, in which case they are not entitled under the decree to be enrolled.

Is it not a startling fact that the number—over 80,000—who applied as Eastern Cherokees for enrollment exceed the number of Indians by blood enrolled by the Dawes Commission in the Five Civilized Tribes? The rolls of that commission show that the total enrollment of Indians by blood in the Five Civilized Tribes up to 1906 was about 78,000, making no deductions for those who died between 1902, when the first roll was made, and 1906, when the second roll was made, adding children born between those dates. (*See Final Rolls of Citizens and Freedmen of Five Civilized Tribes in Indian Territory.*)

This of itself shows the care with which the special commissioner and his assistants had to conduct the investigation to learn who were entitled to be enrolled to share in the fund to be distributed. Especially will this seem startling when it is a well-known historical fact that the number of Indians of all tribes residing in the United States to-day, exclusive of Alaska, varies little from what it was over a hundred years ago.

The Commissioner of Indian Affairs, in his annual report for 1900, page 48, gives estimates of the population of all Indians in the United States from 1759 to 1900; and while there is much uncertainty about the number of Indians in the country prior to 1820, no reliable census having been taken up to that time, the commissioner in said report for 1900 refers to a report made by Morse on Indian affairs in 1820, in which the number is given as 471,036, being the greatest number shown up to that time or since. In 1834—the year before the treaty of 1835—as shown by the report of the Secretary of War, then having charge of Indian affairs, referred to by said commissioner in said report of 1900, there were 312,610. The United States census report for 1890 shows 248,253, while the Commissioner of Indian Affairs in his report for 1909, page 143, gives the total population of Indians in the United States, exclusive of Alaska, at 300,545, so that it is safe to say that the total number of Indians in the United States to-day is no greater, if not less, than it was in 1835.

As the special commissioner was somewhat criticised by counsel on the argument for not having, as they claimed, advised applicants of their rights and of the course they should pursue to establish the same, we deem it but fair to him and of sufficient public interest to refer to his special report—as an appendix to this opinion—made at the request of the court showing the care taken by him and his assistants in the preparation of the roll. The report will speak for itself.

The main contention of those rejected and who have filed exceptions is that they are Cherokees by blood whose ancestors were living within the Cherokee domain at the time of the treaty of 1835-36. But the answer to this contention is that by the express provision of article 15 of the treaty of 1835 the money is to "be equally divided between all the people belonging to the Cherokee Nation east according to the census just completed;" and conceding, as contended, that said roll is incomplete because the number of children only is given, and that some who were entitled to be enrolled were omitted, still when the rolls of 1851 were made they extended and revised the roll of 1835 so as to include the names of all those enrolled in 1835, or their descendants, and presumably all those entitled to enrollment who were omitted from the roll of 1835, or their descendants. Hence in any view of the case the rolls of 1835 and 1851 must be accepted as the correct rolls of those and their descendants now entitled to enrollment.

These views are in harmony also with those acts of Congress accepting the latest annuity rolls as a basis of distribution; and the present Congress by joint resolution (Public, No. 11) approved January 20, 1910, in directing certain moneys to be paid to members of the Winnebago tribe in Nebraska and Wisconsin, directed payment to be made "to the members of the tribe whose names appear on the latest annuity pay rolls in the office of Indian Affairs, with such changes as may have been caused by subsequent births and deaths."

In the preparation of such rolls it has been found absolutely necessary not only by the courts and the executive departments, but by Congress, as shown by their legislation, to adopt some known roll as a basis; and in the present case the lapse of time since the treaties of 1835 and 1846 makes it all the more imperative that the rolls of 1835 and 1851 should be accepted, especially since the roll of 1851 was the one upon which a like fund was distributed to those Eastern Cherokees who were parties to the treaties of 1835–36 and 1846. In other words, the present fund to be distributed is the balance due them for the expenses of their removal from their eastern to their western home in 1838; and if the present fund had then been available it would have been distributed *per capita* to those on the rolls of 1851.

It is conceded that the rolls of 1851 should, in the absence of fraud, be accepted as conclusive as to the rights of those then enrolled and their descendants to share in the distribution of the present fund; and the court is of the opinion that after this lapse of time the rolls of 1835 and 1851 should be equally conclusive against the right of those now seeking enrollment who were then rejected or for other reasons were not enrolled. The court can see no other way to effectuate justice in the execution of its decree in the distribution of the fund.

The rolls of 1851 were made when matters were fresh in the minds of the people, and, too, when a fund of sufficient magnitude was to be divided not only to encourage enrollment, but to cause the applicants to guard the rights of each other. No such condition now exists. The heads of families enrolled in 1835 now living would be approximately 90 years of age, and doubtless few are living, while those who were enrolled as infants in 1851 are now at least 60 years of age, and doubtless most of them have passed away.

Those recommended for rejection and who have filed exceptions are located largely in the East, or their ancestors were living east in 1851, though very few reside with the Cherokees in North Carolina, and still fewer with the Cherokees in Oklahoma, where the great bodies of Cherokees reside.

Furthermore, the roll of 1851, as before stated, was supplemented by the complete roll of 1883–84 of Eastern Cherokees then residing in the East, made by Agent Hester, under the direction of the Secretary of the Interior. This roll refers to the ancestors whose names appear on the rolls of 1851, and was, the commissioner informs us, of great aid to him in identifying those living in the East, from which section the great bulk of the exceptions come.

All this shows the importance of adhering to the rolls of 1835 and 1851. Certain it is that if we should abandon these rolls as the basis of determining the rights of those entitled, as well as of those not entitled, to share in the fund to be distributed, we would be at sea without anchorage, where, at this distance from 1835 and 1851, we would neces-

sarily encounter such doubt and uncertainty as would lead us to the conclusion that oral testimony, whether taken in the form of ex parte affidavits or by the special commissioner or others in the field, would not be of sufficient credibility to convince the court that the rolls of 1835 and 1851 were incorrect or of the right of those claiming to be enrolled under such testimony. For these reasons all motions asking the court to instruct the special commissioner or others to take further testimony in the field are overruled.

When the special commissioner made his report, May 28, 1909, submitting the roll prepared by him for approval, those objecting thereto were, under the order of June 10, 1909, given until August 31 following within which to file their exceptions, and later the time was extended to November 15, 1909. Those so rejected were notified by circular letter under date of the order, and they were advised as to the contents of the order and the requirements in filing their exceptions. That is to say, those excepting to the report of the special commissioner were directed by the order to state in writing the grounds of their exceptions, giving both the Indian and the English name of the ancestor through whom they claimed, and their ages, living in 1835 or 1851, supporting the same by an affidavit of some persons having knowledge of the facts.

These exceptions and the affidavits filed in support thereof as abstracted by the respective counsel have been carefully considered, first by the special commissioner, thereby giving him an opportunity to correct any mistakes he may have made, and whether, in his opinion, further investigation in the field would probably lead to different results. He has submitted supplemental reports showing corrections in his original report arising from duplications in names, omission of minor children by parents in their applications, and some few arising from information obtained from the exceptions filed, and in addition he recommends the names of a few for enrollment who had failed to file their applications within the time prescribed; and as thus corrected the special commissioner submits for approval the corrected roll of 30,818 names.

The court has endeavored to carefully consider and weigh the argument of counsel as well as their briefs and their abstracts of evidence in particular cases; but believing, as we do, that the corrected rolls submitted by the special commissioner for approval contain the names of all Cherokees by blood, "east and west of the Mississippi, parties to the treaties of 1835–36 and 1846 and their descendants," who are entitled to share in the distribution of the fund arising from the decree of the court, we must hold that oral testimony can not now be considered to vary the rolls thus made in 1835 or 1851.

The court therefore reaffirms its rulings made October 28, 1909, holding—

That those who claim through ancestors who were not enrolled with the Eastern Cherokees either in 1835 or in 1851 and were not living within the Cherokee domain in 1835 are not entitled to be enrolled, though of Cherokee descent. Nor are those claiming through remote ancestors, whose immediate ancestors were then living and of age and the heads of families in 1835, but who were not living within the Cherokee domain, and were not enrolled either in 1835 or 1851, now entitled to be enrolled as descendants of some

remote ancestor who was enrolled in 1835, as only those who were members of the tribe at the date of the treaty of 1835–36, or are descendants of such persons, are entitled to be enrolled. Nor are those entitled to enrollment who claim through ancestors whose right to enrollment in 1851 was considered and rejected, as in the absence of fraud such rejection, the court held, must now be considered as final. Nor are those who were slaves, or trace their Cherokee descent through an ancestor who was born a slave, now entitled to be enrolled. Nor are those claiming as descendants of ancestors who were parties to either or both the treaties of 1835–36 and 1846 who have affiliated or been enrolled with other tribes now entitled to be enrolled.

And we will add that those whose immediate ancestors were of age and heads of families living within the Cherokee domain in 1835 who were not enrolled either in 1835 or 1851 and who now claim as descendants of remote ancestors, claimed to have been of Cherokee blood, are not for that reason entitled to be enrolled; nor would the enrollment of remote ancestors operate to preserve the rights of those whose immediate ancestors were entitled but neglected to be enrolled. But whether those now claiming as descendants of immediate or remote Cherokee ancestors by blood, living within the Cherokee domain in 1835, or whether such ancestors were or were not then enrolled, is, for the purpose of the present roll, immaterial, as all such ancestors or their descendants then entitled thereto were presumably enrolled in 1851; and since the rolls of 1851 are the ones upon which the like fund as that now to be distributed was paid, we must hold, in the absence of fraud (which is not charged or imputed), that oral evidence, however taken at this late day, would not be either of sufficient credibility or probative force to overcome the presumption of their enrollment in 1851.

For the reasons given all exceptions filed basing their right to enrollment on any of the grounds hereinbefore referred to are overruled.

The supplemental reports of the special commissioner recommending that some names be stricken from the original roll, correcting the names of others thereon, and adding additional names thereto, are allowed, and the additional names thus recommended for enrollment the court now orders to be printed as a supplement to the original roll; and when so printed the original roll, as thus corrected, together with the supplemental roll, are directed to be submitted to the court as the corrected and final roll for approval.

Howry, J., not having heard the case argued, took no part in its decision.

# APPENDIX.

## SPECIAL REPORT.

*To the Honorable the Chief Justice and justices of the Court of Claims:*

In response to the request of the court I have the honor to report that in carrying out my duties as special agent of the Indian Office and as special commissioner of this court for the enrollment of the Eastern Cherokees I took the measures set forth below to give notice to all persons in interest, and to ascertain whether the claimants were entitled to participate in the fund arising from the judgment of the court of May 28, 1906.

Immediately upon my appointment as special agent of the office of Indian Affairs I prepared a notice in the name of the commissioner, which bore date of August 20, 1906, to all Eastern Cherokees to file their applications for participation in the fund with the Commissioner of Indian Affairs by January 31, 1907. This advertisement set forth that the rolls of 1851, upon which the per capita payment to the Eastern Cherokees was made, would be accepted as a basis and the fund would be distributed to the individuals named in said rolls of 1851 or to their legal representatives.

This notice was published in more than twenty papers, whose circulation covered the territory of the Cherokees, both in the east and in the west. At the same time large posters were printed containing the same notice and were mailed to all the postmasters in the Cherokee territory east and west, with the request that the same be posted in a conspicuous place. Also, these posters were mailed to all the Indian agents and superintendents of Indian schools throughout the United States.

Learning that some difficulty was being experienced in the filling out of the application blanks and that some uncertainty existed as to just what was expected of the claimants, I obtained permission for Mr. J. E. Tylor, my assistant, and myself to proceed to the Cherokee country early in October, 1906, to hold meetings with the Indians and to fully explain to them what was required. Notice of these meetings was given in the local newspapers and they were well attended. Interpreters were used and the whole matter was fully stated. During this trip the special agents met a large number of Indians personally and whenever possible gave the fullest information.

During this trip it came to my attention that some of the full-blood Indians were holding back and not making applications, and I prepared a notice in simple language, containing the substance of the original notice and had the same translated into the Cherokee language and printed in Cherokee type, under date of October 26, 1906. These circulars, or posters, were distributed throughout the full-blood country by the United States Indian agent at the Union Agency, Muskogee, Okla., and by the superintendent of the Indian school at Cherokee, N. C.

Having become satisfied that all those entitled would not file their applications by January 31, 1907, I recommended that the time for filing such applications be extended to March 31, 1907, which was done, and notices of this extension were published in the same manner as the original notices.

When in February, 1907, the Secretary of the Interior referred the question of whether the payment should be made per stirpes or per capita to the Court of Claims, the court entered an order giving notice of the questions raised, which order was published in the following papers:

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|---|---|
| The Bartlesville Examiner | Bartlesville, Okla. |
| The Vinita Leader | Vinita, Okla. |
| The Fort Gibson Post | Fort Gibson, Okla. |
| The Tahlequah Arrow | Tahlequah, Okla. |
| The Muskogee Phoenix | Muskogee, Okla. |
| The Claremore Progress | Claremore, Okla. |
| The Sallisaw News | Sallisaw, Okla. |
| The Fort Smith Elevator | Fort Smith, Ark. |
| The Holly Springs Reporter | Holly Springs, Miss. |
| The Cherokee Scout | Murphy, N. C. |
| The Waynesville Courier | Waynesville, N. C. |
| The Asheville Citizen | Asheville, N. C. |
| The Abingdon Virginian | Abingdon, Va. |
| The Marion Democrat | Marion, Va. |
| The Ducktown Gazette | Ducktown, Tenn. |
| The Cleveland Banner | Cleveland, Tenn. |
| The Chattanooga Times | Chattanooga, Tenn. |
| The Athens Post | Athens, Tenn. |
| The Rome Tribune | Rome, Ga. |
| The Dalton Argus | Dalton, Ga. |
| The Canton Cherokee Advance | Canton, Ga. |

Upon the entry of the order of April 29, 1907, I prepared notices as follows:

"EASTERN CHEROKEES—NOTICE.

"On April 29, 1909, the Court of Claims entered an order in the case of the Eastern Cherokees against the United States, directing that the fund arising from the decree of the court of May 28, 1906, in favor of the Eastern Cherokees be distributed to all Eastern Cherokee Indians, by blood, living on May 28, 1906, who shall establish the fact that they were members of the Eastern Cherokee tribe of Indians at the date of the treaty of 1835–36 and 1846, or are descendants of such persons, and who can further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation; provided, further, that said persons, pursuant to the notices of the Commissioner of Indian Affairs, bearing dates of August 20, 1906, and February 1, 1907, have filed applications for a share of such fund with the Commissioner of Indian Affairs, or shall file such applications with the special commissioner of the Court of Claims on or before the 31st day of August, 1907.

"Therefore all Eastern Cherokees who are entitled under the provisions of said order, as above set forth, who have not already filed applications before the Commissioner of Indian Affairs, should make application to Guion Miller, special commissioner of the Court of Claims, 601 Ouray Building, Washington, D. C.

"Applications for minors and persons of unsound mind should be executed by their parents or persons having their care and custody.

Applications for persons who have died since May 28, 1906, should be filed by their children or legal representatives.

"All applications must be made upon the blank forms prescribed, which may be obtained free of charge by application to the special commissioner. Applications not on the prescribed forms will not be considered.

"Claimants who have already filed applications with the Commissioner of Indian Affairs need not file applications unless they have minor children for whom applications have not been filed. All applications must be filed by August 31, 1907.

"GUION MILLER,
"*Special Commissioner of the Court of Claims,*
"*601 Ouray Building, Washington, D. C.*"

These notices were published for two months in the 21 different papers named above.

At the same time large posters were printed and distributed as in the case of the original notice, and a simplified notice was translated into Cherokee and printed in Cherokee type and distributed through the United States Indian agent at the Union Agency of Muskogee, Okla., and by the superintendent of the Indian school, at Cherokee, N. C.

Application blanks were also prepared and a supplemental application blank was printed and mailed to about 20,000 claimants who had filed original applications with the Commissioner of Indian Affairs, and a circular letter was inclosed in which their attention was called to the provisions of the order of April 29, 1907, and they were notified to fill out the supplemental application in case they had minor children who would be entitled to share under that order.

At the same time an abstract of a decree of the court of May 28, 1906, and of the order of April 29, 1907, was printed, which fully set forth the provisions of the order of April 29, 1907. This abstract was distributed to all attorneys and others making inquiry as to the status of the enrollment, and thousands of these abstracts have been distributed.

The blanks upon which applications were to be made required the claimants to state fully their English and Indian names, residence, age, place of birth, the name of husband or wife, if any, and to what tribe of Indians he or she belonged, and the names of the children. It further required the English and Indian names of their father and mother, where each was born, and where residing in 1851, if living at that time, and the date of death of the father and mother, and whether either of them had ever been enrolled as Indians for annuities or other benefits; and if so, with what tribe. The same information was required as to the grandparents of the claimants. Also, the claimants were to furnish the names of their brothers and sisters, with their ages and residences. Also, the names and residences, where possible, of all their uncles and aunts. Each claimant was further called upon to state whether he had been enrolled as an Indian; and if so, when, where, and with what tribe. In conclusion, the claimant was called upon to give the full English and Indian names, if possible, of his parents and grandparents back to 1835, and was requested to give any additional facts which would assist in proving his claim. This application was required to be

under oath and to be supported by the affidavit of two witnesses who were well acquainted with the applicant, stating how long they had been thus acquainted and that they believed the statements in the application to be true.

These applications were collected into family groups and were carefully examined, and an earnest effort was made to determine whether the claimants or any of their ancestors had been enrolled with the Eastern Cherokees. Where the preliminary examination showed that the application was incomplete or insufficient to establish the right of the claimant, letters were addressed to the older members of the group calling for full information, in which questions of the following nature were asked, as the necessities of each case required:

Do you claim your Cherokee Indian blood through your father or your mother?

Give the date of death of the parent through whom you claim and state how old he or she was at that time. Was he or she recognized as a white person, Indian, or negro in the communities in which he or she resided?

Give the date of the birth of the parent through whom you claim. Were your grandparents on that side living with the white people or with the Indians?

Give the name and place of birth of the grandparent through whom you claim. State whether he or she lived with the Indians or white people, and whether he or she was recognized as a white person, an Indian, or a negro in the community in which he or she lived.

Did the parent and grandparent through whom you claim ever receive any money or land from the Government on account of having Indian blood?

Were any of your ancestors ever enrolled as Indians? If so, state where and with what tribe.

Did the parent through whom you claim, or any of your ancestors, ever take part in any of the Cherokee proceedings? Did they vote with the white people?

Where were the parent and grandparent through whom you claim living at the time the Indians were moved West? Did your parents or grandparents go with them? If not, state why.

Please indicate clearly and fully your reasons for thinking that you are a Cherokee Indian by blood.

Did you ever hear of the treaty the Government made with the Indians in 1835? If so, state what you know about it.

Where were you or your parents living in 1882?

If your parents or grandparents on the side through which you claim were enrolled in 1851, please indicate carefully the names under which you think they were so enrolled, as the names given in your application do not appear upon the rolls taken at that time.

State where your parents were born and where they, or your grandparents on the side through which you claim, resided in 1835, and when they moved West.

When the information obtained from the applications, the rolls, and the correspondence was insufficient to reach a definite conclusion the applications were marked for field examination, and wherever

such claimants resided within the reasonable limits of a field examination they were notified to appear before me, or one of my assistants, and bring with them such witnesses as they might desire to establish their claim. Whenever such claimants presented themselves with their witnesses for examination they were given full and careful examination and every effort made to elicit all the facts that would throw any light upon the claim. With the information thus collected from various sections these applications were given careful consideration in connection with the testimony and the rolls, and where a definite conclusion could not then be reached they were marked for a second field examination, which was conducted in the same manner as the first.

Whenever attorneys for the claimants appeared before any of the examiners in the field they were uniformly afforded every opportunity to examine witnesses and produce additional proof if they so desired.

Respectfully submitted.

GUION MILLER,
*Special Commissioner.*

FEBRUARY 4, 1910.

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15 Orig.

# In the Court of Claims.

No. 23,214.

Office Supreme Court U. S.
FILED
JAN 20 1911
JAMES H. McKENNEY,
Clerk.

THE EASTERN CHEROKEES

*vs.*

THE UNITED STATES.

## Order.

The special agent for the enrollment of the Eastern Cherokees, Guion Miller, having made a report under date of February 18, 1907, to the Commissioner of Indian Affairs, respecting the distribution of the fund arising from the judgment hereinbefore awarded, and the Secretary of the Interior having referred said report on February 20, 1907, to this court for consideration of the matters therein set out, it is ordered this 5th day of March, 1907, that argument be heard upon the matters involved in said report, on Monday, April 8, 1907; and that due notice, by publication, shall be given to all parties in interest to appear on said day. Said notice shall be in form as follows:

Notice is hereby given to all Eastern Cherokees, that the Secretary of the Interior has submitted to the Court of Claims for its decision, various questions respecting the distribution of the fund arising from the judgments

of the Court of Claims of May 18, 1905, and May 28, 1906, involving among others, the following points:

First. Shall the rolls of 1851 be used as the exclusive basis for the present enrollment?

Second. Shall the distribution be per stirpes or per capita?

Third. If per stirpes, what disposition shall be made of those portions for which there have been no applications.

The Court of Claims has fixed Monday, April 8, 1907, for hearing argument upon these questions, when all parties in interest may be represented.

Said publication shall be made in the following newspapers:

In Indian Territory.—Vinita "Leader," Muscogee "Phœnix," Tahlequah "Arrow," Bartersville "Examiner," Fort Gibson "Post," Claremore "Progress," and Sallisaw "News."

In Arkansas.—Fort Smith "Elevator."

In Georgia.—Canton "Cherokee Advance," Dalton "Argus," and Rome "Tribune."

In Mississippi.—Holly Springs "Reporter."

In North Carolina.—Asheville "Citizen," Murphy "Cherokee Scout," and Waynesville "Courier."

In Tennessee.—Athens "Post," Chattanooga "Times," Cleveland "Banner," and Ducktown "Gazette."

In Virginia.—Abingdon "Virginian" and Marion "Democrat."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *February 20, 1907.*

The CHIEF CLERK, the Court of Claims.

SIR: I transmit herewith a communication dated 18th instant addressed to the Commissioner of Indian Affairs by Mr. Guion Miller, Special Agent for the Enrollment of

Eastern Cherokees, with three enclosures, regarding difficulties which have developed in the prosecution of his work of making said enrollment.

Mr. Miller suggests that the Court of Claims be requested to give him further instructions in the matter, and that certain questions, six in number, specified in his said communication, be submitted for the determination of the court. This suggestion is concurred in by the Indian Office; also the further suggestion that the matter be given early consideration, and a ruling obtained, if possible, before the summer vacation of the court.

The matter is, therefore, respectfully submitted, with request for an early consideration and determination of the questions presented by Special Agent Miller.

Very respectfully,

THOS. RYAN,
*First Assistant Secretary,*

1489 Ind. Div., 1907.
4 enclosures.
JES.

OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *February 18, 1907.*

The Honorable, COMMISSIONER OF INDIAN AFFAIRS,
Washington, D. C.

SIR: In the matter of the enrollment of the Eastern Cherokees, I have the honor to report that on January 29, 1907, Belva A. Lockwood, claiming to act on behalf of herself and a large number of her clients as well as a large number of attorneys, filed a petition in this office, asking among other things that the Department ruling of August 20, 1906, which in effect limited the right to enrollment of the Eastern Cherokees to such as were enrolled for the per capita payment made to the Eastern Cherokees in 1851, where living, and to the legal representatives of those so enrolled who have since died, be

changed so as to authorize the enrollment of claimants who can prove that they are the descendants of Eastern Cherokees enrolled under the provisions of the treaty of 1835-6, but who can not show that they, or any of their ancestors, were enrolled in 1851.

The petition makes the claim that the limitation to the rolls of 1851 is in conflict with the terms of the judgment of the Supreme Court in the case, which made no reference to the rolls of 1851, and that for this reason the limitations contained in the order of August 20, 1906, are improper and illegal. The petition goes further and claims that the order of August 20, 1906, does not in fact comply with the terms of the decree of the Court of Claims of May 28, 1906.

This petition puts directly before this office a question which has been informally raised by a large number of attorneys in conversation with me relative to this case, and in quite a large number of applications which have been filed for participation in the Eastern Cherokee fund.

The matter is of such vital importance that I deem it my duty to present the matter fully, and at the same time to call attention to other difficulties which have presented themselves to me in the consideration of this work, and which are more or less involved in the discussion of the petition above referred to.

The decree of the Court of Claims of May 18, 1905, in treating of the disposition to be made of the fund now to be distributed, after providing for the payment of attorneys' fees and the expenses of the enrollment, contains this language: "Second, the remainder to be distributed directly to the Eastern and Western Cherokees, who are parties either to the Treaty of New Echota, as proclaimed May 23, 1836, or the Treaty of Washington of August 6, 1846, as individuals, whether east or west

of the Mississippi River, or *to the legal representatives of such individuals.*"

The Supreme Court modified this portion of the decree by eliminating the Old Settlers, that court making use of this language: "On consideration whereof, it is now here ordered and adjudged by this court that the second subdivision of the fourth paragraph of the decree of the said Court of Claims in this cause be modified so as to direct the distribution to be made to the Eastern Cherokees, as individuals, whether east or west of the Mississippi River, parties to the treaty of 1835–6 and 1846, and exclusive of the Old Settlers, and, as so modified, be, and the same is hereby, affirmed."

It will be noted that neither the original decree of the Court of Claims nor this modification by the Supreme Court of the United States, makes any reference to the rolls of 1851; it will also be noticed that in the Supreme Court order the language, "or to the legal representatives of such individuals," contained in the original decree of the Court of Claims is not retained, and it may be here further noted that this language is not repeated in the final decree of the Court of Claims of May 28, 1906.

In said decree of May 28, 1906, the court, after quoting the language of the mandate of the Supreme Court containing the modification above referred to, proceeds as follows: "And in accordance with said decree, as it was directed to be and is now modified, it is further ordered and decreed that the Secretary of the Interior prepare, or cause to be prepared, a list or roll of all persons coming within the said description entitled to share in the distribution of said fund; and in preparing the said list or roll of such persons, *the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851, upon which the per capita payment*

*to the Eastern Cherokees was made*, and make such distribution in pursuance of article 9 of the treaty of 1846."

The order of August 20, 1906, was based upon this language contained in the decree of May 28, 1906.

That it was the intention of the Court of Claims to have this payment made per stirpes is evident from the language of the original decree, wherein it states that the fund was to be distributed to the parties to the treaties of 1835–6 and 1846, as individuals, "*or to the legal representatives of such individuals;*" nor does there appear to be anything in the mandate of the Supreme Court in conflict with the idea of a per stirpes payment. In order that there may be a per stirpes payment there must be some fixed time, as of which the enrollment is to be made, in order that the exact amount of each distributive share may be determined, and, furthermore, it would be absolutely essential to determine the names of the individuals through whom the per stirpes distribution is to be made.

I am informed that when the final decree was under consideration by the Court of Claims the attention of the court was called to the fact that the Treaty Roll of 1835–6 was incomplete in that it gave only the names of the heads of families, with the number in each family, but without giving the individual names of the other members of the family. There was, I believe, no roll made under the treaty of 1846. I am further informed that the court was advised that while the Treaty Roll of 1835–6 was incomplete, that the rolls of 1851, upon which the per capita payment was made to the Eastern Cherokees, were complete, and did give the individual names of each Indian enrolled. As I understand it, this was the primary cause of the Court of Claims inserting in the decree the provision relative to the rolls of 1851. It was naturally supposed that, inasmuch as the rolls of 1851 were intended to contain the names of all Eastern Cher-

okees entitled under the provisions of the treaties of 1835–6 and 1846, that no hardship would be imposed by adopting these rolls as conclusive evidence of just who were so entitled at that time, and that, as no other complete rolls were available, the necessities of the case would require that the rolls of 1851 be adopted. As I am further advised no question was then raised as to whether or not this provision was in conflict with the terms of the mandate of the Supreme Court.

If this were a controversy affecting white men, *sui juris*, it could be easily maintained that the enrollment of 1851, having been made under direct authority, was in effect a judicial determination of all who were entitled under the treaties of 1835–6 and 1846, to the exclusion of all others not enrolled. There is a serious question, however, as to whether, in a case involving the rights of Indians, who stand in the relation of wards to the Government, an enrollment made independently by the Government of its own motion and without the fullest publication and notice to the Indians, could be held to be a judicial determination of the rights of the Indians, to the exclusion of individuals who may have removed from the locality, and who may have been in ignorance of the fact that an enrollment was taking place.

As a matter of fact, as I am informed, and am lead to believe by some of the applications already on file, there are quite a number of Eastern Cherokees who can prove that they or their ancestors were duly enrolled under the treaty of 1835–6, who will be unable to prove that they or their ancestors were so enrolled in 1851. By way of illustration, I will cite the case of one applicant, which affects a group of applicants similarly situated.

Sarah Poe, of Kansas City, Mo., who was born in 1857, has filed application No. 2028, claiming through her mother, Martha D. Harralson, to her grandfather, Alexander Brown. From affidavits filed in this group of

applications, it appears to be quite well established that Alexander Brown was an Eastern Cherokee Indian, coming originally from McMinn County, Tennessee, and that shortly after the treaty of 1835–6 he removed to Missouri, where he died about 1840. The Treaty Roll of 1835–6 shows Alexander Brown to have been enrolled at that time apparently with two children, but it does not appear that his children were enrolled in 1851; doubtless due to the fact that they were so far removed from their original dwelling place. Clearly, if this applicant can establish the fact that her grandfather, Alexander Brown, was the Alexander Brown whose name was enrolled under the treaty of 1835–6, she will have brought her case within the express terms of the mandate of the Supreme Court of the United States, but owing to the fact that her mother was not enrolled in 1851, it is equally clear that under the order of August 20, 1906, based on the decree of the Court of Claims of May 28, 1906, she would be cut off from participation in this fund.

There are a considerable number of other cases similar to the above, but this is given simply for illustration. It is probable that the attention of the Court of Claims was not drawn to cases of this character when it entered its decree of May 28, 1906.

While discussing this proposition, it may be well also to call attention particularly to the character of the rolls of 1851, and to point out some of the defects in these rolls, which, it is believed, were not brought to the notice of the Court of Claims at the time of the entering of its decree. The rolls of 1851 are divided into two parts, first, the Chapman Roll, which includes the Indians residing east of the Mississippi River, and second, the Drennen Roll, which includes the Eastern Cherokees residing west of the Mississippi River. The Drennen Roll, in turn, is divided into nine divisions or districts. The Chapman Roll includes 2,134 names, to which were added,

by special act of Congress, 87 other names; this roll was based upon a census roll made by D. W. Siler in 1851, and is quite complete in that it gives the names, ages, and relationship of all the Indians, together with the locality in which they reside. Considerably more than half of the Indians on this roll, however, are enrolled under their Indian names. The Drennen Roll of the Eastern Cherokees west of the Mississippi River, is quite incomplete, in that no ages are given and the relationship is not stated, although the names are arranged in what is supposed to be family groups. This roll contains 14,094 names, more than half of which are Indian names and there is nothing to indicate the sex of the persons so enrolled under Indian names.

The two rolls together, therefore, contain 16,315 names, of which 9,000 or 10,000 are Indian names. These Indian names were recorded as the agent understood it at that time, and it is natural to suppose that many inaccuracies in spelling crept in. During the fifty-five years which have elapsed, these Indian names have been to a very large extent abandoned; in other cases they have been changed; and in many others there would be material changes in the recording of such names, owing to the different interpretations of the sound put upon the name by the person transcribing the same. To illustrate this, let me call attention to the names of three Indians which appear on the Chapman Roll of 1851, and also appear on the earlier Mullay Roll of 1848, and the later Sweetland Roll of 1869, and the Hester Roll of 1884. These names are all found on page 13 of the Hester Roll of 1884, without that page having been especially selected for the purpose. The names will be given in the order of the enrollment:

First:

Mullay Roll of 1848, No. 350,
the name is..... Talee-skes-kih;

Chapman Roll of 1851, No. 253, the name is..... Te-lah-ska-skih;
Sweetland Roll of 1869, No. 1065, the name is..... Te-la-ska-ski;
Hester Roll of 1884, No. 454, the name is..... Ta-lee-ske-kih;
And under the head of "latest and most correct spelling of names for this (Hester) census" the name is..... De-lah-ska-skih.

Second:

Mullay Roll of 1848, No. 309, the name is..... Ow-wah-soo-lee-kih;
Chapman Roll of 1851, No. 1456, the name is..... Kah-wah-soo-les kih;
Sweetland Roll of 1869, No. 873, the name is..... Clau-tut-sih;
Hester Roll of 1884, No. 463, the name is..... Klat-en-tul-set;
And under the head of "latest and most correct spelling of names for this (Hester) census" the name is..... Clahn-tah-chih.

Third:

Mullay Roll of 1848, No. 29, the name is..... A-lar-chee;
Chapman Roll of 1851, No. 419, the name is..... John A-lah-chih;
Sweetland Roll of 1869, No. 335, the name is..... John Lar-chi;
Hester Roll of 1884, No. 464, the name is..... Alargih;
And under the head of "latest and most correct spelling of names for this (Hester) census" the name is..... Tsah-ne-lah-tsih.

These three cases illustrate the difficulties that will necessarily arise in endeavoring at this late date, fify-five years after the original enrollment, to connect present claimants with their ancestors, who were enrolled in 1851 under Indian names—and let me repeat that more

than half of the names on the rolls of 1851 are in Indian. In the case of the Eastern Cherokees residing east of the Mississippi River, who were included under the Chapman Roll of 1851, we have the two later rolls above referred to, namely, the Sweetland and Hester rolls, to assist in the investigation, but the last of these was made up more than twenty years ago. In the case of the Eastern Cherokees residing west of the Mississippi River, which comprises the great body of these claimants, we have no later roll to assist in the investigation, as the last enrollment of the Eastern Cherokees, as such, residing west of the Mississippi River, was the enrollment of 1851.

With the great lapse of time, with the uncertainty of spelling, with the known custom among Indians to change or alter their names, such alterations affecting either the beginning or the ending of the name, and being sometimes occasioned by serious sickness or other calamity occurring in the family which would induce them to make a complete change of name, serious question arises as to whether or not it is practicable to trace back relationship in many of these cases to any given name upon the rolls of 1851.

So much for the cases where the enrollment is under an Indian name, but the difficulty does not end there, as there are many cases where only what we would regard as first names are given. For example, on the rolls taken together the name of Nancy by itself appears 176 times; the name of Jinney (in the three spellings of Jinnie, Jinney, and Jinny) appears 90 times; the name of Betsey appears 86 times, while in addition to this the Indian equivalent to Betsey, Quaitsey, appears 47 times; Lucy appears 77 times; John appears 88 times; George appears 65 times, with numerous other cases of single names appearing from 25 to 50 times. In a considerable number of these cases of single names, some family name might

be inferred, but at most it would only be an inference; in many others no family name at all could be gathered from the face of the rolls, and the name would stand simply by itself.

Another source of difficulty is inaccuracy in the original enrollment. The extent of this we can not as yet estimate, but one striking instance has been brought to our attention. One of the divisions of the Drennen Roll is known as the Illinois District; the third group of that district is as follows:

Polly Gearin.
Henry Gearin.
Ellis Gearin.
Fox Gearin.
Maria.
Sarah.
William Barnet.
Platoff Lowry.

A group of eight signed for by Polly Gearin, by mark.

We have been informed that this group consists of the mother, Polly, and seven children. The first three children, however, who are distinctly put down on the roll under the name of Gearin, were not in fact named Gearin, but were by a former marriage, and bore the name of Starr. So, too, while the roll indicates Ellis and Fox Gearin as separate individuals, the facts are reported to be that there was a child named Ellis Fox Starr, and another child named George Starr; the two names of the one child having been divided up and made into two separate individuals, while the true name of one, George, was entirely omitted. The Maria and Sarah named in the group should have been named Gearin, while William Barnet and Platoff Lowry, were also properly named Gearin, and were as a matter of fact twins.

While doubtless this is an extreme case, it forcibly illustrates the difficulties that are bound to arise in en-

deavoring to make a per stirpes distribution, using the rolls of 1851 as a basis.

This last difficulty is, of course, purely a practical and not a legal one. Of the same nature is another, which has assumed in many instances very large proportions. That is the great number of shares claimed by individual applicants, by reason of alleged relationship to individuals alleged to have been enrolled in 1851. A few cases may be cited:

William Elex or Elk, of Tahlequah, Indian Territory, who states that he was born in North Carolina in 1852, files application No. 9817, in which he claims through 44 separate lines, besides for himself, if it should be found that he was enrolled. These relatives consist of grandparents, great-uncles, great-aunts, father and mother, uncles and aunts, brothers and sisters, cousins, etc. While it is highly improbable that this claimant could prove himself to be the next of kin to all of these individuals, yet his claim would have to be examined with reference to each one—that is to say, an examination would have to be made to determine which, if any, of these 44 names were enrolled in 1851. Furthermore, an investigation would have to be made as to whether or not these individuals under some other name, or under some different spelling of the same name, may not have been enrolled. In cases where the names are found on the rolls of 1851, the further inquiry would have to be made as to whether or not these individuals were in fact dead. If so, the place and date of death, and whether or not they left direct issue, and if so whether or not the claimant was in fact in the relationship of one of the next of kin of such party. Also, if he was in that relation, the further inquiry would have to be made to determine how many others were in a like relationship, so that the proportionate part of the share might be determined, and so in regard to each of the others found to have been enrolled.

Another instance of multiplicity of claims may be stated. It is in the case of Polly Russell, who files application No. 10,397, claiming through her grandmother, Oc-tay-yah Guess; grandfather, Tee-see Guess; father, George Guess; brother, John or Benjamin; half-brother, Oo-sac-see-tee; uncle, Dick Guess; uncle, Andy or Joe Guess; uncle, Bat Guess; aunt, Sarah Guess; mother, Gus-sti-yeah Guess; uncle, Rider Che-tee-lun-kee; aunt Che-os-sa; aunt, Liddy; aunt, Si-we-usu-gah; uncle, Oh-sca-seah-tee; uncle, Ou-ja-la-na-he; cousin, Jennie Starr, nee Bump; cousin, Liddy Bump; cousin, Bill Bump; cousin, Wah-you-lah; uncle, Looney Langley; cousin, Ancey Bump; great uncle, Cur-lunt-es-gerner; great aunt, Polly, and their daughter, Tiana.

In submitting this case, Messrs. Watts & Curtis, of Sallisaw, Indian Territory, her attorneys, say: "We hope that you can make something out of these outlandish names; if you can you can do more than we can."

I would also invite your attention to a copy of application No. 10,606, filed herewith, wherein Eliza Andre claims through 53 different lines; and also a copy of her letter wherein she asserts that she will contest the right of all other claimants to any of these shares, except one double first cousin, who is entitled equally with herself.

While these are extreme cases, there are many that are similarly involved with claims made through ten to twenty individuals. The practical difficulty of investigating such claims must be manifest.

As furnishing an illustration of the arithmetical difficulties involved, one other case may be given: Eleanor B. Bell, of St. Elmo, Tennessee, files application No. 10,455, stating, "I claim one-fifth of one-seventh interest in the shares of Albina M., Alexander H. S., and William Joseph Bell; also one-fifth of one-seventh of one-sixth interest in the shares of William, Mary A., William E., and Elizabeth S. Rogers whose names are on the roll of

1851." This is really a comparatively simple case and yet she is claiming a 1-35 interest in three shares, and 1-210 interest in the shares of four others. It follows, of course, that it will be necessary to locate the persons entitled to the remaining 209-210 of these shares.

It has been suggested that under the terms of the decree of the Court of Claims, it was not the intention of the court to have this office trace out the next of kin of deceased Indians enrolled in 1851, and to figure out the share that would go to each such next of kin, but that all that was designed was to have this office determine all of those who were enrolled in 1851, who are now living, thereby necessarily at the same time determining those who are now dead. It would then be necessary to determine the time and place of death of those who had died, and have administrators designated by the appropriate probate courts. After such administrators had been duly appointed and had qualified by giving suitable bonds, the share of the decedents would be paid over to such administrators; leaving to the local probate courts and to such administrators the task of ascertaining the next of kin, and of making the proper distribution to such next of kin when so ascertained.

This procedure would, no doubt, be in compliance with the literal terms of the decree, but it would, I believe, be an innovation in the practice of this office, and it is not in accord with my understanding of the intentions of the Secretary of the Interior and of this office. If such is to be the procedure, it is of the utmost importance that that fact should be determined at the earliest possible moment. Some serious difficulties in proceeding in this way may be suggested. The difficulty of identification of the deceased individual has already been adverted to, but added to this would be the difficulty of locating the exact time and place of death, and of determining what probate court would have

proper jurisdiction of the case, and who was entitled to letters of administration. Serious injustice might result from the omission of individuals entitled to share in the distribution of such fund, resulting from their ignorance of the administration proceedings, either because of actual lack of acquaintance with the name of the decedent as enrolled in 1851, or because of lack of knowledge of the locality where he died. Take for example a case such as is disclosed by application No. 6809, filed by Mary E. Carley of Sheep Ranch, California, claiming through her father, Clement Vann McNair. He was born in Tennessee, was living in the Cherokee Nation in 1851, but shortly after moved to California, where he married, and where claimant was born, and where her father died in 1897. If some relative of McNair's in Indian Territory should see fit to ask for letters of administration there, alleging that McNair lived there in 1851, and had died there, or had not been heard from at any other point, how improbable it is that the daughter in California would ever learn of the proceedings. In this case letters might possibly be taken out in Tennessee, Indian Territory, and California. Difficulties of this character would be much more frequent in cases where the primary beneficiary was enrolled in the east in 1851, but moved to Indian Territory afterward. There are many such cases. Many changes of residence have taken place among these people.

The expense of administration would also be a material item, as in the case of the claimant referred to above, where there were fifty-three shares to be considered. In order to maintain her rights in each instance it might be necessary for this claimant to appear before as many different probate courts, and there litigate her rights as one of the next of kin of the deceased. But leaving out contested cases, in which the expense of litigation might easily consume the entire estate, it is evident that with an enrollment of 16,315 in 1851 there would have to be

now at least 12,000 administrations. Each estate would amount to about $250, and allowing the administrator 10 per cent commission, and estimating the court costs at a minimum of $10, in each case, the total cost to the Indians would be over $400,000, which would be in addition to the expense of this office in making up the rolls.

Again, it seems altogether probable that there may be hundreds, if not thousands, of names on the rolls of 1851 of persons who can not in any way be identified. This would make it possible for persons so disposed to ask for letters of administration on the estates of such persons, averring the date and place of death at some convenient point, publishing the same, and under some claim of relationship securing the money; there being no one having sufficient knowledge of the facts, or of the proceedings, to controvert any of these statements or, in fact, to create sufficient interest to cause an investigation into the rights of such claimants. In these instances unless the Department should assume the responsibility and the burden of investigating each case where such application was made, opportunities for fraud would be almost unlimited.

On the other hand, if administrators are not to be appointed and the per stirpes distribution is to be retained, grave difficulties will arise in determining who are in fact the next of kin of any given decedent; what laws of distribution must apply; whether a husband's right should be recognized in the estate of his deceased wife, and vice versa. As an example of these difficulties, the application of Catharine Craig, No. 9418, may be given. In it she claims as wife of Frank W. Craig, deceased, who was born in Missouri, in 1854. She claims the interest of her husband, in his mother's right, and also the interest of her husband, in his brother's right. Assuming that applicant's mother-in-law, Eliza Craig, was enrolled in 1851, and that her brother-in-law,

William Craig, was likewise enrolled in 1851, the questions involved would be, did Eliza Craig and William Craig die in Missouri; if so, when; did the husband, Frank W. Craig, survive them; was he the sole next of kin of the said Eliza Craig and William Craig; did he die without issue; what was the law of distribution at the place of death of Eliza Craig and William Craig, and at the place of death of the husband, Frank W. Craig? Under the law of distribution applicable in those cases, would the widow have any rights? If so, what would be the extent of those rights? Innumerable questions as to the law of distribution would necessarily arise.

As the Indians have been so widely scattered through so many States and Territories, and the laws of distribution have been changed so frequently, no uniform rule would seem possible.

It has been suggested, and with some force, that, at least up to the time of the judgment entered in this case, there was no property rights vested in any of the Indians, which could properly be the subject of the laws of administration and distribution; that there was only a right of action against the United States which could not be enforced except by the consent of the United States, and that right was vested in the band of Eastern Cherokees rather than in any individual Eastern Cherokee.

In view of the difficulties set forth above, I respectfully suggest that this matter be called to the attention of the Honorable Secretary of the Interior, in order that he may consider the advisability of referring the matter back to the Court of Claims for further instructions. If such reference is made, I would further suggest that questions similar to the following should be submitted to the court for its determination:

First. Should the language of the second paragraph of the decree of the Court of Claims of May 28, 1906, that "it is further ordered and decreed that the Secretary of the Interior prepare, or cause to be prepared, a list or

roll of all persons coming within the said description entitled to share in the distribution of said fund; and in preparing the said list or roll of such persons, the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851, upon which the per capita payment to the Eastern Cherokees was made, and make such distribution in pursuance of article 9 of the treaty of 1846," be so construed as to exclude from enrollment claimants who can establish the fact that their ancestors were Eastern Cherokees at the time of the Treaty of New Echota of 1835–6, and were enrolled as such under said treaty, but who are unable to prove either that they were themselves enrolled with the Eastern Cherokees for the per capita payment on the rolls of 1851, or that they are the legal representatives of some one who was so enrolled in 1851? In other words, shall the rolls of 1851 be taken as the basis for the present enrollment, to the exclusion of all persons not enrolled in 1851, or not directly tracing through some one so enrolled at that time, notwithstanding such persons could prove that they or their ancestors were duly enrolled under the Treaty of New Echota in 1835–6?

Second. Is the distribution to be *per stirpes* or *per capita?*

Third. If per stirpes, from what time? This question is, of course, dependent upon the answer to the first question, for if the rolls of 1851 are to be the exclusive basis for the enrollment, that would fix the time.

Fourth. If the payment is to be made per stirpes, must each present beneficiary be enrolled, and the exact amount due each determined and payment made to him direct, or, must administrators upon the estates of the primary beneficiaries be appointed, and the shares of the decedents paid over to such administrators, leaving to the local courts to determine the laws of descent applicable to each case, and the persons who are the next of kin entitled to participate in such estates?

Fifth. If the payment is to be made per stirpes what disposition shall be made of the shares of primary beneficiaries, who left no known next of kin; or where no letters of administration have been taken out upon the estate of such primary beneficiaries?

Sixth. If the payment is to be made per capita, as of what date shall the enrollment be made?

There have already been filed over 17,500 applications, and by the 31st of March, the time now limited for the filing of applications, there will probably be something over 20,000 such applications.

Pending the determination of the questions above indicated there is ample work to keep the present force engaged in making the preliminary examination of these applications, having omissions supplied, and grouping them into families, so that the claims of relatives may be considered together. No matter what answers may be given to the above questions this work will have to be done.

Although I have known of several of the difficulties referred to above for sometime, I thought it best to wait until the whole matter had been fully developed before asking for further instructions, so that all questions to be raised might be disposed of together. I believe, however, that the facts have now been fully disclosed, and if the matter is to be referred to the Court of Claims it is important that this should be done in time to secure, if possible, a ruling from that court before the summer vacation.

I inclose, herewith, a copy of the order of August 20, 1906, referred to above, which was in fact only the formal notice to claimants to file claims, which notice was duly approved by the Secretary of the Interior, before issuance.

Very respectfully,

GUION MILLER,
*Special Agent for the Enrollment of Eastern Cherokees.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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## Original, No. 15.

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IN THE MATTER OF THE EASTERN CHEROKEES,
PETITIONERS.

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## BRIEF FOR PETITIONERS.

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### Statement of Facts.

The present proceeding seeks a writ of mandamus to compel the Court of Claims to obey a mandate of this court, chiefly in respect to the method of distribution of a certain fund which has heretofore been awarded the petitioners.

The facts are not disputed and are all matters of record to be found (*a*) in the record in the following cases in this court October Term, 1905, No. 346, United States, Appellant, *vs.* Cherokee Nation; 347, Eastern Cherokees, Appellants, *vs.* United States and the Cherokee Nation; 348, Cherokee Nation vs. The United States; (*b*) in the opinion of this court in the aforementioned consolidated cases, 202 U. S., 101; (*c*) in the mandate of this Honorable Court

affirming the decree of the Court of Claims in said cases; (*d*) in the record in the Court of Claims subsequent to the filing of said mandate therein.

The opinions of the Court of Claims in respect to these cases are found in 40 Ct. Cl., 252, and 44 Ct. Cl.

The fund, which is practically $5,000,000.00, had its inception in a treaty between the Cherokees and the United States of 1835-36 (7 Stat. L., 478) and 1846 (9 Stat. L., 871). The fund represents the balance due to the Eastern Cherokees for the expenses of their removal from their Eastern to their Western home in 1838.

Briefly stated, the history of the controversy between the Eastern Cherokees and the United States is as follows:

The government, being desirous in 1835 of removing the Eastern Cherokees from their then location in Alabama, Georgia, Tennessee, and North Carolina, made a treaty with the Indians by which, among other things, it was provided that the Indians should remove to a location west of the Mississippi River; the expenses of the removal and certain allowances of sustenance were to be paid by the government. By the provisions of this treaty certain lands and improvements were to be ceded to the United States, and the consideration therefor was to be $5,000,000.00.

Concerning the distribution of the moneys to be paid by the United States to the Cherokees, this treaty of 1835 (7 Stat. L., 478) provided:

> "ARTICLE 15. It is expressly understood and agreed between the parties to this treaty that after deducting the amount which shall be actually expended for the payment for improvements, ferries, claims, for spoliations, removal subsistence and debts and claims upon the Cherokee nation and for the additional quantity of lands and goods for the poorer class of Cherokees and the several sums to be invested for the general national funds; provided for in the several articles of this treaty the balance whatever the same may be shall be equally divided between all

> the people belonging to the Cherokee nation east according to the census just completed; and such Cherokees as have removed west since June, 1833 who are entitled by the terms of their enrollment and removal to all the benefits resulting from the final treaty between the United States and the Cherokees east they shall also be paid for their improvements according to their approved value before their removal where fraud has not already been shown in their valuation."

Certain of the Cherokees were said to have been dissatisfied with the provisions of this treaty. A supplemental treaty of 1836 (7 Stat. L., 488) was made; this treaty confirmed and ratified, if this term can be used, the previous treaty of 1835.

The Eastern Cherokees who removed west, in accordance with the provisions of these two treaties, did so prior to and during the year 1838. Previous to the making of the treaties, certain Eastern Cherokees had voluntarily changed their homes to land west of the Mississippi River and these have since been termed "Old Settlers."

In 1846 a treaty was made between the United States and the Eastern Cherokees (9 Stat. L., 871), which provided, among other things, for the distribution of the money due under the treaties of 1835 and 1836. This treaty provided for distribution to the "Old Settlers" and the Cherokees who had then recently moved to homes west of the Mississippi River.

With respect to the distribution of such portion of the fund as was to be paid to the "Old Settlers," the treaty of 1846 (9 Stat. L., 871) provided:

> "ARTICLE 5. It is mutually agreed that the per capita allowance to be given to the 'Western Cherokees,' or 'Old Settlers,' upon the principle above stated, shall be held in trust by the Government of the United States, and paid out to each individual belonging to that party or head of family, or his

legal representatives. And it is further agreed that the per capita allowance to be paid as aforesaid shall not be assignable, but shall be paid directly to the persons entitled to it, or to his heirs or legal representatives, by the agent of the United States, authorized to make such payments.

"And it is further agreed that a committee of five persons shall be appointed by the President of the United States, from the party of 'Old Settlers,' whose duty it shall be, in conjunction with an agent of the United States, to ascertain what persons are entitled to the per capita allowance provided for in this and the preceding article."

The same treaty provided with respect to the distribution of money to the Eastern Cherokees as follows:

"ARTICLE 9. The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the per capita division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians for the additional quantity of land ceded to said nation; and the several sums provided for in the several articles of the treaty, to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, per capita, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing East at the date of said treaty and the supplement thereto."

Distribution of the moneys in supposed conformity of the provisions of the three treaties was made in 1852. The amount set forth in the treaties as the consideration for the cession by the Indians of certain lands and improvements was not, however, distributed in full. Instead of a distribution of a fund aggregating more than $5,000,000.00, about $4,000,000.00 was distributed and the difference is accounted for by a charge made by the Government against the Cherokees, being the alleged cost of the removal of those Eastern Cherokees who went West from Georgia and other southeastern States to Indian Territory between 1835 and 1838.

It appears that the Eastern Cherokees have continuously, since the distribution made in 1852, made claim that the charge against them was improper. The subject has been several times before committees of Congress, and finally the question of whether or not the Eastern Cherokees had a valid claim in any behalf against the United States was committed to accountants Slade and Bender. Their report found that certain sums were due the Eastern Cherokees from the United States, including the sum of $1,111,284.70. The other amounts due to the Cherokees from the United States by said report are relatively insignificant and are not here the subject of controversy.

By section 68 of the act of July 1, 1902, jurisdiction to hear and determine the claims of the Eastern Cherokees against the United States was conferred upon the Court of Claims, with right of appeal to this court. An amending act of March 3, 1903, was passed (32 Stat. L., 996), and gave to certain classes of Eastern Cherokees a right to be parties to the suit and conferred additional jurisdiction upon the Court of Claims in that it could not only hear and determine the claims as between the United States and the Eastern Cherokees, but also "determine between the different claimants to whom the judgment so rendered equitably belongs."

Upon pleadings, proofs, and argument the court entered

on May 18, 1905, a decree awarding judgment against the United States in favor of the Eastern Cherokees for the sum of $1,111,284.70, with interest at five per cent from June 12, 1838, to date of payment. (Item 2, Decree Ct. Cl., May 18, 1905.)

This decree provided that with respect to this sum of $1,111,284.70 that there should be first subtracted certain costs and expenses and with respect to the method of distribution, directed:

> "Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

All parties to the litigation before the Court of Claims appealed to this court in accordance with the jurisdiction conferred by Section 68 of the Act of July 1, 1902 (32 Stat. L., 726), and act of March 3, 1903 (32 Stat. L., 996).

This court affirmed the decree of the Court of Claims but directed a modification of the decree in order that the terms thereof might be precise and distinct concerning those entitled to the fund. This court held that the terms of the decree might be liable to misconstruction, by which the "Old Settlers" would be held to be entitled to participate. To prevent any such possible misconstruction, the mandate of this court provided as follows:

> "On consideration whereof, it is now here ordered and adjudged by this court that the second subdivision of the fourth paragraph of the decree of the said Court of Claims in this cause be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-36 and 1846; and exclusive of the Old Settlers and, as so modified, be, and the same is hereby, affirmed."

On the entry of the mandate from this court, the Court of Claims on May 28, 1906, modified its original decree by an order following:

> "These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to the Court that by the said mandate it is provided that the second subdivision of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the Treaties of 1835-6 and 1846, and exclusive of the Old Settlers, it is therefore so ordered and decreed."

By order entered April 28th, 1907, the Court of Claims further modified its final decree of May 18, 1905, as modified May 28, 1906, as follows:

> "It further appearing to the Court that the lands disposed of by the Eastern Cherokees under the Treaties of 1835-6 and 1846, were owned by them as a community, and the rights arising under said treaties, as established by the decree of May 28, 1906, accrued to the said Eastern Cherokees as communal owners of said land; and it further appearing from the report of Special Agent Guion Miller, accompanying the reference of the Secretary of the Interior of February 20, 1907, above referred to, that a per stirpes distribution to the Eastern Cherokees who were parties to the Treaties of 1835-6 and 1846 is impracticable; it is therefore further ordered that the commissioner hereinafter named shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee Tribe of Indians at the date of the

> Treaty of 1835-6 and 1846, or, are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation; provided further, that said persons, pursuant to the notices of the Commissioner of Indian Affairs, bearing dates of August 20, 1906, and February 1, 1907, have filed applications for a share of such fund with the Commissioner of Indian Affairs,or shall file such applications with the commissioner hereinafter named on or before the 31st day of August, 1907."

It was also determined by this Honorable Court on April 30, 1906, as appears from the opinion in said cases (202 U. S., 101, 130), that the judgment in favor of the Cherokees should be "subject to the limitation that the amount thereof should be paid to the Secretary of Interior to be distributed directly to the parties entitled to it."

In accordance with the limitation the Court of Claims, on May 28, 1906, directed the Secretary of Interior to prepare or to have prepared a list or roll of Cherokees entitled to share in the amount of the said judgment.

Thereafter, contrary to said limitation, the Court of Claims, by order entered the 29th day of April, 1907, provided "that [the] direction of the decree of the Court" (Court of Claims) "of May 28, 1906, which provides that the Secretary of the Interior shall prepare, or cause to be prepared, a list or roll of all persons entitled to share in the fund arising from said decree, and to make distribution of said fund be, and the same is hereby, vacated."

On April 29, 1907, the Court of Claims, by order, appointed a special commissioner to prepare a roll of persons entitled under the terms and conditions of the decrees and orders of the Court of Claims to share in the funds arising under said judgment.

On the same day the Court of Claims by decree provided as follows:

"It is further ordered that all the expenses, incurred in carrying into effect the provisions of this decree, together with the expenses already incurred in making publication of said order of March 5, 1907, shall, upon the proper certificate made under oath by said commissioner, and duly approved by the court, be paid by the Secretary of the Treasury out of the appropriation made by the act of Congress of June 30, 1906, to pay said judgment in favor of the Eastern Cherokee Indians as aforesaid."

On March 7, 1910, the Court of Claims denied certain exceptions to enrollment made for and on behalf of certain Eastern Cherokees; said exceptions included, with respect to certain applicants, whether or not said applicants were entitled to participate in the fund arising from said judgment upon the ground that such parties would not be included in a *per stirpes* distribution; that is to say, said exceptions raised the question whether or not certain persons on said roll "were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or (to) the legal representatives of such individuals" [decree of Court of Claims, May 18, 1905] and "exclusive of the Old Settlers" [modification of this Honorable Court of April 30, 1906].

On March 7, 1910, the Court of Claims approved a certain roll, being a list of persons entitled to distribution of the fund arising under said judgment; said roll was prepared by the direction of said Court so that a *per capita* distribution of said fund as of May 28, 1906, shall be made.

The opinion of the Court of Claims of March 7, 1910, is reported, 44 Ct. Cl., —; as an appendix to the opinion is a report of the Commissioner appointed by the Court of Claims to make the distribution; this report shows, among other things, that after the entry of the mandate of this court, the Commissioner by his acts represented to the Eastern Cherokees that the distribution would be *per stirpes*.

In the Appendix to this brief will be found full excerpts from the findings of fact and conclusions of law of the Court of Claims, the opinion and mandate of this court and certain orders of the Court of Claims entered subsequent to the entry of the mandate and bearing upon the matter now under consideration.

Aside from the manifest differences in the present decree from that prescribed by the mandate of this court, there is apparent one important and vital change, which affects each and every member of the Eastern Cherokees, to wit, the method of distribution. By the original decree of the Court of Claims the distribution was to be *per stirpes;* by the affirmance of this court the distribution was to be *per stirpes;* by the present decree of the Court of Claims the distribution is to be *per capita.*

Motion for leave to file petition for writ of mandamus and brief in support thereof were submitted to this court May 31, 1910; leave to file petition was granted and rule to show cause issued October 17, 1910.

## Points and Authorities.

### I.

*The provisions of the treaties of* 1835-36 *and* 1846 *required the Court of Claims to make a distribution per stirpes in its decree of May* 18, 1905.

The treaty of 1835-6 in Article 15, provided that "the balance whatever the same may be shall be equally divided between all the people belonging to the Cherokee nation east according to the census just taken" (meaning Census of 1835).

This language contemplated an immediate payment to be made to the Cherokees, who had been ascertained according to the census, and who were all alive, and no provision was made in the treaty for payment in the event of the death of

such distributees, nor indeed was any needed. However, as a matter of fact the payment was not then made, and when, ten years later, the treaty of 1846 was executed it provided for the payment of the balance to the identical parties to whom it was to be paid under the prior treaty, but owing to the lapse of ten years, and the death during that period of a number of those whose names appeared upon the census roll of 1835, the language was modified to meet the changed condition, by allowing representation in the case of those who had died.

The treaty of 1846, provided in Article 9:

> "The balance thus found to be due shall be paid over, *per capita,* in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

In other words, the parties to be benefited by the distribution provided for in the 9th section of the treaty of 1846 are the identical parties to whom the United States agreed to pay the sum found due under the treaty of 1835 and the change in the language was only such as was necessary to secure to those who represented deceased members of the Cherokee tribe, their legal share, as standing in the place of their deceased ancestor. In connection with the interpretation of section 9 of the treaty of 1846, resort can profitably be had to sections 4 and 5 of the same treaty which provided for the distribution of a sum equal to one-third of this fund to those who afterwards came to be known as "Old Settlers." The two classes of Cherokees, viz., Eastern Cherokees and Old Settlers, were entitled as of the same right, and the two sections must be construed as providing the same method of distribution in each case. The fund payable to the "Old Settlers" under sections 4 and 5 has already been distributed and these sections of the treaty have been under consider-

ation and interpreted by this court in the case of the Old Settlers, 148 U. S., 427. The court in that case held that by virtue of the treaty of 1835, the communal character of the property was terminated and the fund taking the place of the realty was held by the United States as a trust fund for the benefit of the parties entitled thereto. The court said (page 479):

> "The lands west of the Mississippi were held as communal property, not vested in the Cherokees as individuals, as tenants in common or joint tenants; but by the treaties of 1835 and 1846 the communal character of the property was terminated as to both Eastern and Western Cherokees, and the fund taking the place of the realty, was invested in the various ways we have mentioned, leaving the remainder to be distributed *per capita.*"

*The use of the term per capita in the treaty does not preclude a per stirpes distribution at this time.* While the term *per capita* is frequently used to distinguish the method of distribution of the estate of a deceased person where no representation is allowed, from that method of distribution in which representation is allowed, and which is called from that fact a *per stirpes* distribution, the use of the term in the treaty was not made in any such connection. There was no estate of a decedent to be distributed, but a particular fund arising from the sale of communal lands. Immediately upon the transfer of those lands, each member of the community became entitled to his individual share of that fund, equal in all respects with the share of every other individual; and it was this idea of equality and individuality of the shares which was conveyed to the Indians by the term *per capita.* A *per capita* payment at the present time to all individual Cherokee Indians by blood, living on May 28, 1906, will not accomplish the result contemplated by a per capita payment in 1836, and in order that the United States may discharge the obligation assumed by it in the

treaty of 1835-'36 and 1846 and found by the opinion of this court to be as yet undischarged, viz: to pay to the Indians who were parties to those treaties their per capita share of the fund, it must at this date make the distribution to the representatives of those Indians who have died during the intervening period while the United States was wrongfully withholding the fund from them.

## II.

*"Parties to the treaties of* 1835-'36 *and* 1846" *means not only those who signed the treaties on behalf of the Cherokees, but also all those Cherokees who composed the Cherokee Nation east at that time.*

This language is descriptive of the class entitled to receive the fund. The class, according to the roll of 1835, numbered 16,542 persons; according to the roll of 1851, on which distribution was made to the "Old Settlers" and as well to the Eastern Cherokees for a part of the amount due, about the same number.

## III.

*The word "legal representatives," in connection with the description of the class entitled to receive ("parties to the treaties"), can mean only a per stirpes distribution.*

It may be admitted for the purpose of the argument, and for the purpose of the argument only, that the term legal representatives, standing by itself is one of doubtful, ambiguous or uncertain meaning. The term is sufficiently broad to cover all persons who, with respect to others, properly stand in their place and represent their interests, whether transferred to them by act of the parties or by operation of

law. It may include assignees, executors, and administrators; it may under certain circumstances mean "heirs."

Whenever and wherever a question arises as to the correct meaning of the term "legal representative," it is proper that recourse should be had to the context and if necessary to the subject-matter. In the pending case, the use of the term "legal representative" in the decree of the Court of Claims of May 18, 1905, ought to be interpreted and construed in the light of the provisions of the several treaties, of the distribution made to the "Old Settlers" under the treaties, of the partial distribution to the Eastern Cherokees under the treaties, of the pleadings in the Court of Claims and particularly with reference to what the individual claimants, Eastern Cherokees, considered the term to mean.

It is well settled that in transactions with Indians, their interpretation of what is meant by the language must, if possible, be followed. Choctaw Nation *vs.* United States, 119 U. S., 1.

The fund arising under these treaties, when the land of the Eastern Cherokees had been ceded to the United States, in accordance with the provision of the treaties, immediately became due to all the people of the Cherokee Nation east, the amount to be distributed according to the census just taken.

If additional words need be supplied to determine the proper meaning of the term "legal representatives," as used in the decree of the Court of Claims, although it is respectfully submitted that the term as used is sufficiently clear to indicate what individuals are meant and to clearly indicate what method of distribution was intended, the question then arises what words shall be supplied? It cannot be argued that the word "attorneys" or "attorneys in fact" would show the intent of the Court of Claims. The only words which can be added with a view to clearness are the words "heirs" or "administrators." By the addition of either of these words, the distribution must be *per stirpes.*

There is no direct evidence before this court to show what

the Cherokees understood was the meaning of the words "legal representatives." With knowledge, however, of the method of distribution made to the "Old Settlers" and with knowledge of the method of the partial distribution made to the Eastern Cherokees, and with knowledge of the several advertisements and pronouncements of the Commissioner of the Court of Claims, it is reasonable to presume that the individual claimants to the fund clearly understood that the distribution would be *per stirpes;* that they would now receive the fund due in the same manner as they and their ancestors had received the partial distribution of the same fund in 1852.

Further, as appears from the record of the Court of Claims, since the entry of the decree on the mandate, a *per stirpes* distribution was contemplated for more than a year after the entry of the mandate.

The term "legal representatives" has been under construction of the courts in a number of cases and has been uniformly held to mean those who succeed to the inheritance of the estate or those upon whom the law devolves the legal capacity of an administrator or executor. In the case of Thompson *vs.* U. S., 20 Ct. Cl., 276, that court said:

> "The term 'legal representative' is not of uniform interpretation. It may mean those who succeed to the inheritance of the estate, or it may mean those upon whom the law devolves the legal capacity of an administrator. * * * The ordinary meaning of the words 'representatives,' 'legal representatives,' 'personal representative,' is, that they refer to the person constituted representative by the proper court, and the onus is upon those attempting to maintain a different construction to show a different meaning."
>
> "In the absence of anything appearing in the context, those words found in a statute or written instrument must be held as meaning the administrator or executor."

In the case of Briggs *vs.* Walker, 171 U. S., 466, the court said "The primary and ordinary meaning of the words 'representatives,' or 'legal representatives,' or 'personal representatives,' when there is nothing in the context to control their meaning, is 'executors or administrators,' they being the representatives constituted by the proper court."

In Heirs of Emerson *vs.* Hall, 13 Pet., 409, 413, this court interpreting and construing an act of Congress (March 3, 1831) which directed money to be paid to the "legal representatives" of one Emerson said:

> "That the heirs were intended by this designation is clear; and we think the payment which has been made to them under this act has been rightfully made, and that the fund cannot be considered as assets in their hands for the payment of debts."

The term "legal representatives" was interpreted by the court in Duncan *vs.* Walker, 2 Dallas, 205, construing the act of assembly, December 2, 1784, securing the right of pre-emption to certain settlers; and the question arising at the trial whether the right of pre-emption granted in the terms of the act should vest in the real or personal representatives of the grantee, after argument, the court were of opinion:

> "That by the words 'legal representatives,' heirs, or alienees, were to be understood; for, though the expression might, in the abstract, appear equivocal and ambiguous, it was explained by the *subject matter;* and land, *ex vi termini,* importing *real* estate, the *legal representative* must, in legal contemplation, be the heir, and not the administrator."

Arguing by analogy, the fund created by the treaties may, under the doctrine of conversion, become personal property, and, if so, the term "legal representatives," in legal contemplation may refer to the administrator of deceased parties. However, whether the term mean "heir," or "administrator," the result is the same, *i. e.,* a *per stirpes* distribution.

## IV.

*The Court of Claims in its original decree (May 18, 1905) provided for a distribution per stirpes.*

The XXI Finding of Fact of the Court of Claims sets forth the computation by which the fund arises and concludes:

> "The balance to be distributed per capita according to the above report and which was not distributed [in 1852], to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 per capita, excluding interest, they should have received the further sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total per capita of $124.78" (Rec., 109).

Upon the facts found, the Court of Claims concluded as law, *inter alia:*

> "(*d*) The amount represented by item numbered two (2), for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi River, and should be paid to them or to their legal representatives by the Secretary of the Interior" (Rec., 111).

Based upon the finding of fact and conclusion of law above set forth, the court decreed, May 18, 1905, as follows:

> "The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same

under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:—

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

The language of the decree, just quoted, can mean no other than a *per stirpes* distribution, save by the use of violence not warranted.

The parties entitled to distribution had not been identified by name, so the class was described. That class is "Eastern and Western Cherokees" "who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, as individuals,"— "or to the legal representatives of such individuals." That is, to the legal representatives of the Cherokee signers of the treaties and those whom said signers represented.

## V.

*This court, by its mandate, directed a per stirpes distribution of the fund to those entitled.*

The paragraph of the decree of the Court of Claims, which was modified, read:

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were

> parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

The mandate required that this paragraph of the decree—

> "be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-6 and 1846; and exclusive of the Old Settlers."

It will be observed that the mandate of this court did no more than exclude from the distribution the Old Settlers. All other matters, including the method of distribution, remained as provided in the decree of the Court of Claims.

## VI.

*The mandate of this court was interpreted to mean a per stirpes distribution by the Court of Claims and its Commissioner.*

The Court of Claims did not redraft its decree of May 18, 1905, but on the receipt of the mandate of this court entered an order May 28, 1906, as follows:

> "These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to the court that by the said mandate it is provided that the second subdivision of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals,

> whether east or west of the Mississippi River, parties to the Treaties of 1835-6 and 1846, exclusive of the Old Settlers, it is therefore so ordered and decreed."

The Commissioner of the Court of Claims interpreted the decree of that court entered May 28, 1906, as providing for a *per stirpes* distribution, and made known his interpretation by public advertisements to the claimants. This appears from the Special Report of said Commissioner to that court under date of February 4, 1910, printed as an appendix to the opinion of the court of March 7, 1910 (44 Ct. Cl., —), in the items following:

> "This advertisement set forth that the rolls of 1851, upon which the *per capita* payment to the Eastern Cherokees was made, would be accepted as a basis and the fund would be distributed to the individuals named in said rolls of 1851 or to their legal representatives." * * *
>
> "When in February, 1907, the Secretary of the Interior referred the question of whether the payment should be made *per stirpes* or *per capita* to the Court of Claims, the court entered an order giving notice of the questions raised, which order was published in the following papers:
>
> "The Bartlesville Examiner, Bartlesville, Okla.
>
> * * * * * * *"

That the Court of Claims also interpreted its order of May 18, 1905, and the mandate of this court of April 30, 1906, and its order of May 28, 1906, as prescribing a *per stirpes* distribution appears from the order of the Court of Claims entered April 29, 1907, reading, in part:

> "It further appearing to the court that the lands disposed of by Eastern Cherokees under the Treaties of 1835-6 and 1846, were owned by them as a community, and the rights arising under said treaties, as established by the decree of May 28, 1906, accrued to the said Eastern Cherokees as communal owners of said land; and it further appearing from the report of Special Agent Guion Miller, accom-

> panying the reference of the Secretary of the Interior of February 20, 1907, above referred to that a per stirpes distribution to the Eastern Cherokees who were parties to the Treaties of 1835-6 and 1846 is impracticable; it is therefore further ordered that the commissioner hereinafter named shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee Tribe of Indians at the date of the Treaty of 1835-6 and 1846, or, are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation; provided further that said persons, pursuant to the notices of the Commissioner of Indian Affairs, bearing dates of August 20, 1906, and February 1, 1907, have filed applications for a share of such fund with the Commissioner of Indian Affairs, or shall file such applications with the Commissioner hereinafter named on or before the 31st day of August, 1907."

While an inferior court may, if necessary, interpret and construe the mandate of this court, yet when the inferior court, after due deliberation, has interpreted and construed a mandate it ought not thereafter change its interpretation. If the mandate and the opinion are uncertain or ambiguous, it is for this court to construe the mandate and state its meaning.

## VII.

*A per stirpes distribution of the fund is proper and equitable in view of the treaties, the origin of the fund and the laws of the Cherokees, and also because the Court of Claims, and this court, each with full authority and jurisdiction in the premises to determine, have after full consideration finally so determined.*

It would be inequitable to make a per capita distribution of the fund, because (*a*) treaty rights would be violated, and (*b*) the distribution under act of August 23, 1894, to the kinsmen of the present claimants, the Western Cherokees, was *per stirpes*.

The laws of the Cherokees (published by the authority of the National Council, 1875, pursuant to an act bearing date of November 19, 1874, appointing commissioners to revise, amend and codify the existing laws) provided with respect to the descent of property in Article IV, as follows:

> "SEC. 30. Whenever any person shall die possessed of property not devised, the same shall descend in the following order, to wit:
>
> "1st. In equal parts to the husband or wife, and the children of such intestate, and their descendants; the descendants of a deceased child, or grandchild, to take the share of the deceased parent equally among them.
>
> "2d. To the father and mother equally, or to the survivor of them.
>
> "3d. In equal parts to the brothers and sisters of such intestate, and their descendants; the descendants of brothers or sisters to take the share of the deceased parent equally among them.
>
> "4th. When there are none of the foregoing persons to inherit, the property of such deceased person shall go to his next of kin by blood. Kindred of the whole and half blood, in the same degree, shall inherit equally.
>
> "5th. The property of intestates, who have no surviving relative to inherit as above, shall escheat to the treasury of the Nation, to be placed to the credit of the orphan fund."

The laws of the Cherokee Nation provided elaborately in chapter IX for granting of letters of administration and letters testamentary.

## VIII.

*All matters except the ministerial act of making distribution and ascertaining the names of the individuals and legal representatives and the allowance of fees and expenses, under the act of March 3, 1903 (which was specifically reserved by the Court of Claims), were before this court and by it finally determined.*

---

In the response of the Court of Claims filed November 16, 1910, the right of the petitioners to represent the Eastern Cherokees or to employ counsel is denied. The petition for writ of mandamus is made by the Eastern Cherokees and the authority under which the petition is filed is duly set out in Exhibit No. 1 (Petition, p. 9), and the capacity in which certain individual Cherokees invoke the jurisdiction of this court herein is stated in paragraph 2 of the petition (Petition, p. 2). Certainly the Eastern Cherokees have a right to apply to this court for mandamus. This right is given them by the Jurisdictional Act, as is also the authority to employ counsel to prosecute their rights. There is nothing alleged in the response of the Court of Claims to show a lack of authority, either to file the petition in this case or to employ counsel, and it is submitted where the Eastern Cherokees have been given the authority to do both these acts it will be assumed, in the absence of some showing to the contrary, that their exercise of the authority has been properly made.

All the other points made by the court in justification of its action in making the change in its method of distribu-

tion after the mandate of this court had been received and in disregard of the terms of that mandate, we believe to be fully treated in the foregoing sections of this brief.

JOHN B. DAISH,
JOSEPH D. SULLIVAN,
*Attorneys for the Eastern Cherokees.*

WASHINGTON, *January* 3, 1911.

# APPENDIX.

## COURT OF CLAIMS.

No. 23,199, The Cherokee Nation *vs.* The United States; No. 23,212, The Eastern Cherokees *vs.* The United States; No. 23,214, The Eastern Cherokees *vs.* The United States and the Cherokee Nation.

### Finding of Fact XVII.

(Pp. 101-102, Record, cases Nos. 346, 347, 348; October Term, 1905, Supreme Court of the United States.)

By act of Congress of February 29, 1889 (25 Stats., 694), it was provided:

"That the claim of that part of the Cherokee Indians known as the Old Settlers or Western Cherokees against the United States, which claim was set forth in the report of the Secretary of the Interior to Congress of February third, eighteen hundred and eighty-three (said report being made under act of Congress of August seventh, eighteen hundred and eighty-two), and contained in Executive Document Number Sixty of the second session of the Forty-seventh Congress, be, and the same hereby is, referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred on said court to try said cause and to determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of treaty stipulations and acts of Congress relating thereto, after deducting all payments heretofore actually made to said Indians by the United States, either in money or property; and after deducting all offsets, counterclaims, and deductions of any and every kind and character which should be allowed to the United States under any valid provision or provisions in said treaties and laws contained, or to which the United States may be otherwise entitled."

Under this act suit was instituted in the Court of Claims on behalf of the "Old Settlers," and resulted in a judgment against the United States for $224,972.68, "being a balance of the per capita fund provided by the fourth article of the treaty between the United States and the Western Cherokees, dated August 6, 1846, together with interest thereon from the 12th day of June, 1838, up to and until the entry of this decree, being the sum of $603,145.58, and likewise the sum of $4,179.26 for 3343 41-100 acres of land in Arkansas ceded to the United States by article 4 of the treaty of May 6, 1828, amounting in the aggregate to the sum of $832,297.52" (27 Ct. of Cls., 1, 20, 56).

## Findings of Fact XXI.

(Pp. 108-109, Record, cases Nos. 346, 347, 348; October Term, 1905, Supreme Court of the United States.)

In arriving at the item of $1,111,284.70, the accountants among other tabulations made the following statement of the account:

"Figuring upon the basis stated in the ninth article of the treaty of 1846, and following the auditor's and comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067 the excess payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

| | | |
|---|---|---|
| For improvements | | $1,540,572.27 |
| For ferries | | 159,572.12 |
| For spoliations | | 264,894.09 |
| For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items | $335,105.91<br>1,047,067.00 | 1,382,172.91 |
| For debts and claims upon the Cherokee Nation | | 101,348.31 |

| | |
|---|---|
| For the additional quantity of land ceded to the nation | 500,000.00 |
| For amount invested as the general fund of the nation | 500,880.00 |
| For subsistence furnished after expiration of one year, under agreement that it should be charged to treaty fund | 172,316.47 |
| | $4,621,756.17 |
| For lands and possessions | 5,000,000.00 |
| For spoliations | 264,894.09 |
| Balance of $600,000 applicable to removal | 335,105.91 |
| Appropriation of June 12, 1838 | 1,047,067.00 |
| | $6,647,067.00 |
| From which deduct charges as above | 4,621,756.17 |
| Balance to be distributed per capita | $2,025,310.83 |
| Deduct amount actually distributed as already explained | 914,026.13 |
| Balance due | $1,111,284.70 |

The sum of $914,026.13, actually distributed to the Eastern Cherokees in 1852, out of the above balance of $2,025,310.83, was appropriated as follows:

| | |
|---|---|
| Amount found due by Treasury officials, under article 9, 1846, in the report of the auditor and comptroller of December 3, 1849 | $627,603.95 |
| Erroneous charge corrected by act of February 27, 1851 | 96,999.42 |
| Erroneous charge account subsistence, corrected by Congress, September 30, 1850 | 189,151.24 |
| | $914,026.13 |

This amount of $914,026.13 was distributed solely to 14,098 Eastern Cherokees in the west and 2,133 Eastern Cherokees who remained east.

Interest on the above sum of $914,026.13 at 5 per cent from June 12, 1838, was also appropriated by Congress and

distributed per capita to said Eastern Cherokees in the same payment. The balance to be distributed per capita according to the above report and which was not distributed, to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 per capita, excluding interest, they should have received the further sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total per capita of $124.78.

The settlement made with the Old Settlers was as set forth in Finding XVIII [XVII].

## Conclusions of Law.

(Pp. 111-112, Record, cases No. 346, 347, 348; October Term, 1905, Supreme Court of the United States.)

Upon the foregoing facts the court concludes as matters of law:

First. That the United States is indebted to the Cherokee Nation in the following amounts, viz:

(1) The sum of $2,125, with interest at 5 per cent from February 27, 1819, to date of payment;

(2) The sum of $1,111,284.70, with interest at 5 per cent from June 12, 1838, to date of payment;

(3) The sum of $432.28, with interest at 5 per cent from January 1, 1874, to date of payment;

(4) The sum of $20,406.25, with interest at 5 per cent from July 1, 1893, to date of payment,

and is entitled to have judgment entered in its favor against the United States therefor.

Second. The proceeds of so much of said judgment as pertains to the items numbered 1, 3, and 4 equitably belong to the Cherokee Nation as a political or social body, and such proceeds, less any proportion thereof which the Cherokee Nation may have contracted to pay on account of counsel fees and other expenses of this litigation, should be paid or disposed of as follows, viz:

(*a*) The amount represented by item numbered three (3), for $432.28 and interest, should be paid to the treasurer of the Cherokee Nation, or to such other person or

officer either of the nation or of the United States as may hereafter succeed to his duties;

(*b*) The amount represented by item numbered one (1), for $2,125 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the principal of the "Cherokee school fund," of which fund the United States are trustees;

(*c*) The amount represented by item numbered four (4), for $20,406.25 and interest, should be paid to the Secretary of the Interior in trust and credited on the proper books of account to the "Cherokee national fund," of which fund the United States are trustees;

(*d*) The amount represented by item numbered two (2), for $1,111,284.70 and interest, less counsel fees and expenses, equitably belongs to the Eastern and Western Cherokees who were parties either to the treaty of New Echota, proclaimed May 23, 1836, or the treaty of Washington, of August 6, 1846, as individuals, whether east or west of the Mississippi River, and should be paid to them or to their legal representatives by the Secretary of the Interior.

Third. Such counsel fees as may have been contracted to be paid by the Cherokee Nation in the manner prescribed by sections 2103 to 2106, both inclusive, of the Revised Statutes of the United States, and such other counsel fees and expenses as may be allowed by this court pursuant to the provisions of the act of March 3, 1905, set forth in Finding of Fact No. 1, should be paid to the parties entitled to receive the same by the Secretary of the Treasury upon the making of an appropriation by Congress for the payment of the judgment in this cause.

Fourth. The cost and expenses incident to ascertaining and identifying the individuals entitled to participate in the distribution of the balance of the amount represented by item numbered two (2), and the making of the distribution thereof, should be a charge upon such balance for distribution and should be deducted therefrom.

BY THE COURT.

# OPINION OF THE SUPREME COURT OF THE UNITED STATES.

(202 U. S., 101.)

Nos. 346, 347, and 348, October Term, 1905.

346.

THE UNITED STATES, Appellant,
*vs.*
THE CHEROKEE NATION.

347.

THE EASTERN CHEROKEES, Appellants,
*vs.*
THE CHEROKEE NATION and THE UNITED STATES.

348.

THE CHEROKEE NATION, Appellant,
*vs.*
THE UNITED STATES.

Appeals from the Court of Claims.

[April 30, 1906.]

Section 68 of the act of Congress of July 1, 1902, entitled "An act to provide for the allotment of the lands of the Cherokee Nation and for the disposition of town sites therein described, and for other purposes" (32 Stat., 726), reads as follows:

"Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within

two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time."

February 20, 1903, the Cherokee Nation filed a petition in the Court of Claims asking judgment on an account rendered by Slade & Bender, pursuant to the treaty of March 3, 1893 (27 Stat., 640), with interest.

March 3, 1903, an act was approved entitled "An act making appropriations for the current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes" (32 Stats., 996), containing the following provisions:

"Section sixty-eight of the act of Congress entitled 'An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' approved July 1st, nineteen hundred and two, shall be so construed as to give the Eastern Cherokees, so called, including those in the Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by their proper authorities, their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the

termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned in House of Representatives Executive Document Numbered Three hundred and nine of the second session of the Fifty-seventh Congress; and if said claim shall be sustained in whole or in part, the Court of Claims, subject to the right of appeal named in said section, shall be authorized to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part, and shall be required to determine whether, for the purpose of participating in said claim, the Cherokee Indians who remained east of the Mississippi River constitute a part of the Cherokee Nation or of the Eastern Cherokees, so called, as the case may be."

The claim mentioned in said H. R. Ex. Doc. No. 309, 57th Cong., 2d sess., is therein referred to as "the award rendered under the Cherokee agreement of December 19, 1891, ratified by act of Congress approved March 3, 1893."

March 14, 1903, a petition was filed on behalf of all the Eastern Cherokees, both west and east of the Mississippi River, alleging in substance that there was due to the Eastern Cherokees, upon the account of Slade & Bender, the sum of $1,111,284.70, with interest from June 12, 1838, as an award against the United States or, if the court should not hold said account as an award, the sum of $1,761,447.27, with interest at 5 per cent from the same date, together with interest on the income annually accruing, at the rate of 5 per cent per annum until paid, by virtue of the treaties of 1828 (7 Stat., 313), and the treaty of 1835-'36, commonly known as the "treaty of New Echota" (7 Stat., 478). But at the trial of the case no contention was made for this larger amount.

March 20, 1903, a petition was filed on behalf of certain Eastern Cherokees, living east of the Mississippi, amended September 3, 1903, when petitioners took the title of the Eastern and Emigrant Cherokees, asserting their claim to a *pro rata* share of—

"That portion of the removal and subsistence fund improperly taken by the United States from the five million

fund on account of removal of Eastern Cherokees, as found by the expert accountants, Messrs. Slade & Bender, April 28, 1894, the said five million fund being an interest-bearing fund in the hands of the United States, as trustee, and representing the money paid by the Government to the Eastern Cherokees for the sale of their lands in North Carolina, Georgia, and Tennessee, or east of the Mississippi River, as set forth in article 1st of the treaty of New Echota, in north Georgia, on March 14, 1835, and articles 2 and 3 of the supplemental treaty, proclaimed May 23, 1836, this sum so misapplied amounting, in accordance with said accounting, to $1,111,284.70, with interest at 5 per cent per annum from the date of said wrongful taking, June 12, 1838, to date."

The three petitions were consolidated and heard as one case, and although in effect the proceedings were in equity, findings of fact and conclusions of law were filed.

Among the facts found were these:

XVIII.

"By section 14 of the act of Congress entitled 'An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1890, and for other purposes,' approved March 2, 1889 (25 Stats., 1005), the President was authorized to appoint three commissioners to negotiate with the Indian tribes owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and he did appoint David H. Jerome, Alfred M. Wilson, and Warren G. Sayre such commissioners.

"By virtue of the authority contained in an act of the Cherokee national council, approved November 16, 1891, Elias C. Boudinot, Joseph A. Scales, Roach Young, William Triplett, Thomas Smith, Joseph Smallwood, and George Downing were duly appointed commissioners—

"To meet and enter into negotiations with the above-named commission, appointed by the President of the United States, for the cession of the lands of the Cherokee Nation west of the 96th degree of west longitude, and for the final adjust-

ment of all questions of interest between the United States and the Cherokee Nation which are now unsettled.'

"By said act of Congress it was made the duty of said commissioners appointed by the President to report all agreements resulting from such negotiations to the President, to be by him reported to the Congress at its next session, and by the act of the Cherokee council it was made the duty of the commissioners, on the part of the Cherokee Nation, to report all their proceedings in full to the national council for its approval and ratification. (Ex Doc. 56, 52d Cong., 1st sess., 17.)

"At the outset of the negotiations between said commissioners for the purchase and sale of said lands, which were known as the 'Cherokee Outlet,' the commissioners on the part of the Cherokee Nation renewed their claims and contentions with respect to the balances alleged to be due to them under various treaties, and particularly their contention that the so-called treaty fund had been improperly charged with the expense of the removal of the Eastern Cherokees to the Indian Territory, and demanded as 'a condition precedent to any agreement for the sale of the land' that some adjustment of such contentions should be made.

"On the 19th of December, 1891, after prolonged negotiations, the commissioners above named entered into articles of agreement, by Article I of which it was agreed that—

'The Cherokee Nation, by act duly passed, shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth (100°) degree of west longitude, on the north by the State of Kansas, on the east by the ninety-sixth (96°) degree west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation created or defined by Exectuive order, dated August 10, 1860, the tract of land embraced within the above boundaries containing eight million one hundred and forty-four thousand six hundred and eighty-two and ninety-one one-hundredths (8,144,682.91) acres, more or less.'

"By article 2 that—

'For and in consideration of the above cession and relinquishment the United States agrees:'

"First. That it will remove from the limits of the Cherokee Nation as trespassers certain described persons.

"Second. That a certain article of the antecedent treaty of July, 1866, should be abrogated and held for naught.

"Third. That the judicial tribunals of the Cherokee Nation should have exclusive jurisdiction in certain cases.

"Fourth. That—

'The United States shall, without delay, render the Cherokee Nation, through any agent appointed by authority of the national council, a complete account of moneys due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect; and upon such accounting, should the Cherokee Nation, by its national council, conclude and determine that such accounting is incorrect or unjust, then the Cherokee Nation shall have the right, within twelve months, to enter suit against the United States in the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from, or improperly or unjustly or illegally adjusted in, said accounting; and the Congress of the United States shall, at its next session, after such case shall be finally decided and certified to Congress according to law, appropriate a sufficient sum of money to pay such judgment to the Cherokee Nation, should judgment be rendered in her favor; or if it shall be found upon such accounting that any sum of money has been so withheld, the amount shall be duly appropriated by Congress, payable to the Cherokee Nation, upon the order of its national council, such appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.'

"Fifth. That certain citizens of the Cherokee Nation should have the right to select lands as homesteads under certain conditions; and

"Sixth. In addition to all of the foregoing enumerated considerations for the cession and relinquishment of title to the described lands, the United States shall pay to the Cherokee Nation, at such times and in such manner as the Cherokee national council shall determine, the sum of $8,595,736.12 in excess of the sum of $728,389.46, the ag-

gregate of amounts heretofore appropriated by Congress and charged against the lands of the Cherokees west of the Arkansas River.

"Said articles of agreement were accepted, ratified, and confirmed on the part of the Cherokee Nation by an act of the national council approved January 4, 1892, and were also accepted, ratified, and confirmed on the part of the United States by act of Congress of March 3, 1893 (27 Stat. L., 640).

"Prior to the acceptance and ratification of said agreement on the part of the United States, as aforesaid, the commissioners on behalf of the United States, as required by the law under which they were appointed, had reported to the President the making of the articles of agreement aforesaid, and by way of explanation said:

'As to the conditions of the agreement, besides the relinquishment of title upon the one part and the payment of a price in money on the other, it is necessary to state that the settlement of the matters contained in such conditions were made a condition precedent to any agreement for the sale of the land.

'The accounting provided for in the fourth subdivision of article 2 of the agreement is inserted and agreed to, because the Cherokees are compelled to accept the construction of the treaties made by the executive and administrative branches of the Government.

'Whatever that construction is, the Indian must abide by. There is no appeal except to Congress. Without going specifically into details the Cherokees claim that upon a just accounting upon a proper construction of the treaties named, a large sum of money, principal and interest, will be found due them. They also desire to include lands as well as money, but they were induced to eliminate 'lands' from the provision. With that eliminated the provision was agreed to, as set out. The Government has made the accounting, has kept the books, has construed the treaties. If that has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected.' (Sen. Ex. Doc. 56, 52d Cong., 1st sess., pp. 11, 12.)

"Gen. Thomas J. Morgan, Commissioner of Indian Affairs, in his report to the Secretary of the Interior on Feb-

ruary 6, 1892, made the following explanation and comment on the fourth section of article 2, to wit:

'The fourth section of article 2 provides for an accounting between the United States and the Cherokee Nation. The work necessary to render this account will be very heavy, and much time will be necessary to properly prepare the same. On this provision of the agreement the commissioners say:

" 'The Government has made the accounting, has kept the books, has construed the treaties. If this has been done properly, no harm can come from restating the account. If it has not been done properly, no possible reason can exist why the error should not be corrected. It creates no new obligations against the Government, but only provides for legal discharge of the old ones.'

"This seems to me to be a reasonable view to take of this provision, and I do not see that any valid objection could be advanced against it.

'In your reference of the matter to this office you said:

" 'Particular attention is called to section 4 of article 2 of the agreement, with request for a full report as to what may be the state of the account between the United States and the Cherokees, if practicable, within a reasonable time; if not, your general conclusions.'

"In reply to this indorsement I have the honor to say that if this section is construed to require the United States to state an account of moneys stipulated to be paid to the Cherokee Nation, under the treaties therein specified and under the various appropriation acts to carry the same into effect, this account could be prepared by this office within a reasonable time, say about two months. If, on the other hand, it be construed to require a detailed statement of all the moneys received and disbursements made by the United States of the Cherokee funds under said treaties and acts of Congress, which seems to me to be the intention of the parties negotiating the agreement, it would require the services of an expert accountant, with assistants, probably twelve months or more to review and copy the Cherokee accounts and records running back nearly a century. In order to prepare a statement of this kind it would require an appropriation by Congress of the sum of at least $5,000 to pay for the services of an expert accountant, and in the draft of a bill for the ratification of the agreement herewith

enclosed, I have provided for the appropriation of that sum, or so much thereof as may be necessary for that purpose." (Senate Ex. Doc. No. 56, 52d Cong., 1st sess., p. 8.)

"This report of the Commissioner was, on or about February 8, 1892, referred by the Secretary of the Interior to the Assistant Attorney-General for the Interior Department 'for his consideration and report upon the legality of the contract, the sufficiency of the proposed bill, and his views upon the questions of law relating to the subject,' and on or about February 25, 1892, said officer reported thereon, as appears in said Senate Executive Document 56, Fifty-second Congress, first session, saying, among other things:

'The report and agreement were referred to the Commissioner of Indian Affairs, who, under date of February 6, 1892, reported favorably on the agreement, and transmitted with his report the draft of a bill to be submitted to Congress to ratify and carry out the provisions thereof. . . . The agreement contains two articles. The first relates to the cession and the second to the consideration therefor. . . .

'The considerations for said cession, as contained in article 2, are set forth under six subdivisions. * * *

'The fourth and next provision of article 2 of the agreement requires the United States to render to the Cherokee Nation a complete accounting of all money agreed to be paid to the Indians, or which they may be entitled to under any treaty or act of Congress since 1817. And if said accounting is satisfactory Congress shall make the necessary appropriation to pay the same. But if the accounting is not satisfactory, then the Cherokees to have the right to institute suit in the Court of Claims against the United States for the claimed amount, and Congress is to make the necessary appropriation to pay the judgment, if any, recovered.

'I see nothing in the stipulations herein to comment upon. It seems right and promotive of good feeling that there should be a full and final settlement of all claims and accounts of these Indians against the United States, and I think the terms of agreement are sufficiently clear to secure such accounting.

'The Commissioner of Indian Affairs asks for a special appropriation of $5,000 to enable him to make the accounting.'

"All of these reports were before the Congress when it accepted and ratified said articles of agreement by act of

March 3, 1893 (27 Stat. L., 641), in the following language, to wit:

'Which said agreement is fully set forth in the message of the President of the United States, communicating the same to Congress, known as Executive Document No. 56 of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the 'Cherokee Outlet;' and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and to acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject also to certain amendments thereto, as follows: . . . (Amendments not important here.) . . .

'And the provisions of said agreement so amended shall be fully performed and carried out on the part of the United States; provided that the money hereby appropriated shall be immediately available, and the remaining sum of eight million three hundred thousand dollars, or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal instalments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated;

* * * * * * *

'The acceptance by the Cherokee Nation of Indians of any of the money appropriated as herein set forth shall be considered and taken and shall operate as a ratification by said Cherokee Nation of Indians of said agreement, as it is hereby proposed to be amended, and as a full and complete relinquishment and extinguishment of all their title, claim, and interest in and to said lands;

* * * * * * *

'And said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become, and be taken to be and treated as a part of the public domain.'

XIX.

"By said act of March 3, 1893, ratifying said agreement for the purchase of the 'Cherokee Outlet' the Congress also provided as follows:

"The sum of five thousand dollars, or so much thereof as may be necessary, the same to be immediately available, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to enable the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to employ such expert person or persons to properly render a complete account to the Cherokee Nation of moneys due said nation, as required in the fourth subdivision of article 2 of said agreement."

"Thereafter James A. Slade and Joseph T. Bender were employed as experts under the provisions of said section of said act, and they made and rendered an account pursuant to the provisions of paragraph 4 of article 2 of the articles of agreement of December 19, 1891, as ratified and affirmed by said act of March 3, 1893. Said account was, by the Secretary of the Interior, referred to the Commissioner of Indian Affairs for examination and report, and the same having been examined and approved by said Commissioner, was by the latter returned to the Secretary of the Interior, who transmitted the same to the Cherokee Nation by delivering a copy thereof to R. F. Wyley, its properly constituted agent for receiving the same, and said account so made, rendered, and transmitted was accepted by the Cherokee Nation by an act of its national council approved December 1, 1894, and no suit was thereafter brought by the Cherokee Nation against the United States, charging that said account was in anywise incorrect or unjust, but, on the contrary, the principal chief of the Cherokee Nation, as required by the act of its national council above referred to, did notify the Secretary of the Interior of the acceptance by said nation of said account as so stated by Messrs. Slade and Bender, and did request said Secretary of the Interior to notify the Congress of the United States of such acceptance, and on the 7th of January, 1895, the Secretary of the Interior reported the entire matter to the Congress in the following words:

'SIR: I have the honor to herewith transmit, in compliance with the provisions of the third subdivision of article 2 of

the agreement made December 19, 1891, with the Cherokee Indians, ratified by the act of Congress approved March 3, 1893 (27 Stat., 643), a certified copy of 'a complete account of moneys due the Cherokee Nation under any of the treaties made in the years 1817, 1819, 1825, 1833, 1835-36, 1846, 1866, and 1868, and any laws passed by the Congress of the United States for the purpose of carrying said treaties, or any of them, into effect,' prepared in accordance with the provisions of the said act of March 3, 1893, together with a certified copy of an act of Cherokee national council accepting such accounting.

'The Speaker of the House of Representatives.' (House Ex. Doc. No. 182, 53d Cong., 3d sess.)

XX.

"The report and accounting made by said James A. Slade and Joseph T. Bender, referred to in the foregoing finding, is in the words and figures which appear in House Executive Document 182, Fifty-third Congress, third session. The conclusion thereof is as follows:

'The foregoing statement covers, it is believed, every point at issue which can be raised under the treaties described in the articles of agreement [a number of demands made by the Cherokee Nation were disallowed], and the result of the finding is submitted in the following schedule:

'Under the treaty of 1819:

| | |
|---|---|
| Value of three tracts of land containing 1,700 acres, at $1.25 per acre, to be added to the principal of the 'school' fund ..... (With interest from February 27, 1819, to date of payment.) | $2,125.00 |
| Under treaty of 1835: | |
| Amount paid for removal of Eastern Cherokees to the Indian territory improperly charged to treaty fund... (With interest from June 12, 1838, to date of payment.) | 1,111,284.70 |

| | |
|---|---|
| Under treaty of 1866: | |
| Amount received by receiver of public moneys at Independence, Kans., never credited to Cherokee Nation ..... (With interest from January 1, 1874, to date of payment.) | 432.28 |
| Under act of Congress, March 3, 1893: | |
| Interest on $15,000 of Choctaw funds applied in 1863 to relief of indigent Cherokees, said interest being improperly charged to Cherokee national fund With interest from July 1, 1903, to date of restoration of the principal of the Cherokee funds, held in trust in lieu of investments.' | 20,406.25 |

'Washington, D. C., April 28, 1894.

(Signed) JAS. A. SLADE.
JOS. T. BENDER.'

XXI.

"In arriving at the item of $1,111,284.70 the accountants, among other tabulations, made the following statement of the account:

'Figuring upon the basis stated in the ninth article of the treaty of 1846, and following the Auditor's and Comptroller's figures in the accounting of December 3, 1849, and eliminating from the charges made against the total fund of $6,647,067 the excess of payments over the amounts appropriated by the United States for that purpose, the true statement of the account is as follows:

| | | |
|---|---|---|
| For improvements | | $1,540,572.27 |
| For ferries | | 159,572.12 |
| For spoliations | | 264,894.09 |
| For removal and subsistence, being the amount actually provided and expended for these purposes, and consisting of the following items.. | $335,105.91<br>1,047,067.00 | 1,382,172.91 |
| For debts and claims upon the Cherokee Nation | | 101,348.31 |

| | |
|---|---|
| For the additional quantity of land ceded to the nation | 500,000.00 |
| For amount invested as the general fund of the nation | 500,880.00 |
| For subsistence furnished after expiration of one year, under agreement that it should be carged to treaty fund | 172,316.47 |
| | 4,621,756.17 |
| For lands and possessions | 5,000,000.00 |
| For spoliations | 264,894.09 |
| Balance of $600,000 applicable to removal | $335,105.91 |
| Appropriation of June 12, 1838 | 1,047,067.00 |
| | 6,647,067.00 |
| From which deduct charges as above | 4,621,756.17 |
| Balance to be distributed per capita | 2,025,310.83 |
| Deduct amount actually distributed as already explained | 914,026.13 |
| Balance due | 1,111,284.70 |

"The sum of $914,026.13 actually distributed to the Eastern Cherokees in 1852, out of the above balance of $2,025,310.83, was appropriated as follows:

| | |
|---|---|
| Amount found due by Treasury officials, under article 9, 1846, in the report of the Auditor and Comptroller of December 3, 1849 | $627,603.95 |
| Erroneous charge corrected by act of February 27, 1851 | 96,999.42 |
| Erroneous charge account subsistence, corrected by Congress, September 30, 1850 | 189,151.24 |
| | 914,026.13 |

"This amount of $914,026.13 was distributed solely to 14,098 Eastern Cherokees in the West and 2,133 Eastern Cherokees who remained East.

"Interest on the above sum of $914,026.13 at 5 per cent from June 12, 1838, was also appropriated by Congress and

distributed per capita to said Eastern Cherokees in the same payment. The balance to be distributed per capita according to the above report and which was not distributed, to wit, $1,111,284.70, is the sum of which the Eastern Cherokees complain they were deprived in the settlement of 1852; that while they received only $56.31 per capita, excluding interest, they should have received the further sum of $1,111,284.70, or a total of $2,025,310.83, as appears in the above account rendered as the true balance under article 9, making them a total per capita of $124.78.

"The settlement made with the Old Settlers was as set forth in Finding XVII.

XXII.

"Neither the whole or any portion of the various sums with interest found and stated by the concluding schedule of the so-called Slade-Bender report to be due to the Cherokee Nation under the treaties and acts of Congress therein referred to have been paid to the Cherokee Nation, or to any officer, agent, or other person acting in its behalf.

"With the exception of the provision contained in the act of March 2, 1895, making appropriations for the legislative, executive, and judicial expenses of the Government, directing the Attorney-General to review and report upon the conclusion of law disclosed in the account of Slade and Bender, and the passing of the provisions of the acts of July 1, 1902, and March 3, 1903, conferring jurisdiction upon the United States Court of Claims to hear and determine these causes, the Congress has taken no action whatever with respect to the said account of Slade and Bender or the amounts found due thereunder.

"Acting under said direction of March 2, 1895, above referred to, the Attorney-General of the United States, on December 2, 1895, addressed a communication to the Congress wherein he advised that body of his disagreement with the conclusions reached by said Slade and Bender. Said communication of the Attorney-General was, on December 2, 1895, by the Congress referred to the Committee on Indian Affairs and ordered to be printed, and the same appears in Senate Executive Document No. 16, Fifty-fourth Congress, first session."

May 18, 1905, the court "adjudged, ordered, and decreed

that the plaintiff, the Cherokee Nation, do have and recover of and from the United States as follows:

| | |
|---|---|
| Item 1. The sum of..... | $2,125.00 |
| With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment. | |
| Item 2. The sum of..... | 1,111,284.70 |
| With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment. | |
| Item 3. The sum of..... | 432.28 |
| With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment. | |
| Item 4. The sum of ..... | 20,406.25 |
| With interest thereon from July 1, 1893, to date of payment. | |

"The proceeds of said several items, however, to be paid and distributed as follows:

"The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the 'Cherokee school fund' now in the possession of the United States and held by them as trustees.

"The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said nation entitled to receive it.

"The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee national fund,' now in the possession of the United States and held by them as trustees.

"The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

"So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same, upon the making of an appropriation by Congress to pay this judgment.

"The allowance of fees and expenses by this court under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States."

The facts are stated *in extenso* in the report of the case, 40 Ct. Cl. 252, occupying some forty pages.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Of the four items of the amounts allowed, only one, that for $1,111,284.70, need be considered here.

(1) The correctness of the account is conceded, and the question is whether the United States were properly held

liable therefor. The Court of Claims ruled that the account rendered by Slade and Bender under the agreement between the United States and the Cherokee Nation, ratified by Congress, was neither an award nor an account stated, but that the United States were nevertheless liable in the circumstances for the balance found.

The case is thus put by Chief Justice Nott:

"But while the account was neither an award nor an account stated, it must be conceded that the scope of the accounting was intended to be as broad as the causes of action secured by the agreement to the Cherokee Nation 'the right within twelve months to enter suit against the United States in the Court of Claims for any alleged or declared amount of money promised but withheld by the United States from the Cherokee Nation, under any of said treaties or laws, which may be claimed to be omitted from or improperly or unjustly or illegally adjusted in said accounting.' That is to say, the court, or the accountants, were to go behind statutory and treaty bars and receipts in full and were to consider 'any alleged or declared amount of money promised but withheld' 'under any of said treaties or laws.' This meant that there were to be no technical defences set up, no pleas of *res judicata*, no releases or relinquishments, compromises or settlements; or it meant nothing. . . .

"Interpreted in the light of the long, sore controversy which had existed between the parties, it is plain that the Cherokees believed the agreement to mean (and the United States allowed them so to believe) that all of their claims and rights and equities were to be reopened and re-examined *de novo;* and that upon the faith of that belief they made a cession of the Outlet. In the opinion of the court this case is simply one to recover purchase money upon a contract of sale. Ordinarily, in such a case, the cession would not be made, the deed would not be delivered, until the purchase money is paid or secured or, at least, the amount be ascertained and liquidated. In this case both parties wanted to expedite the transaction. It was important for the United States that the cession of the territory should be made immediately; it was desirable for the Cherokee Nation that the purchase money should be paid soon. But, nevertheless, the Cherokee Nation had the right to immediate payment, and the agreement intended to secure to them the next thing to it—the right to an early payment. The accounting was

merely a means to an end. The end was the immediate payment, as near as might be, of the whole consideration to be given for the cession of the Outlet. When the cession was made the purchase money was due; the only thing remaining, which was the object of the accounting, was to ascertain the exact amount. This is not the case of a party prosecuting an unliquidated debt, but a case of sale and delivery and non-payment of the purchase money for the thing sold and delivered. The United States were willing to pay; the Cherokee Nation wanted the payment made at the earliest possible day; both parties agreed upon a method by which it should be paid as nearly immediately as was possible. The United States were to render their account 'without delay;' if the Cherokee Nation accepted it, the amount was to be appropriated by Congress; such 'appropriation to be made by Congress, if then in session, and if not, then at the session immediately following such accounting.' If the Cherokee Nation did not accept the accounting, or regarded it as incorrect or unjust, and carried it into the courts and recovered a judgment, Congress was to appropriate 'at its next session after such case shall be finally decided.' Nothing was left to the ordinary uncertainties and procrastinations of legislation, and no agreement could have made the obligation to pay promptly more unequivocal and specific. Time was of the essence of the contract, so far as the words of the parties could make it.

"The court does not intend to imply that when the account of Slade and Bender came into the hands of the Secretary of the Interior he was bound to transmit it to the Cherokee Nation. On the contrary, the Cherokee Nation had not agreed to be bound by the report of the accountants and could not claim that the United States should be. The accountants were but the instrumentality of the United States in making out an account. When it was placed in the Interior Department it was as much within the discretion of the Secretary to accept and adopt it or to remand it for alterations and corrections as a thing could be. He was the representative of the United States under whom the agreement had been made, and he was the authority under which the account had been made out, and when he transmitted it to the Cherokee Nation his transmission was the transmission of the United States. When the account was thus received by the Cherokee Nation (May 21, 1894), the 'twelve

months' of the agreement, within which the nation must consider it and enter suit against the other party in the Court of Claims, began to run, and with the nation's acceptance of the account (December 1, 1894) the session of Congress at which an appropriation should be made became fixed and certain. The Secretary did not recall the account; the United States never rendered another, and the utmost authority which Congress could have exercised, if any, was, at the same session, or certainly within the prescribed 'twelve months,' to have directed the Secretary to withdraw the account and notify the Cherokee Nation that another would be rendered. The action of the Secretary of the Interior, combined with the inaction of Congress to direct anything to the contrary, makes this provision of the agreement final and conclusive. The Cherokee Nation has parted with the land, has lost the time within which it might have appealed to the courts, and has lost the right to bring the items which it regards as incorrectly or unjustly disallowed to judicial arbitrament, and the United States are placed in the position of having broken and evaded the letter and spirit of their agreement."

Weldon, J., concurred with the Chief Justice in a separate opinion. Peelle, J., concurred in the judgment, but rested his conclusion on the ground that the United States were liable "to pay the expense of removal" of the Eastern Cherokees from their eastern home to the Indian Territory, under the treaties of 1835-36 and 1846. (7 Stat. 478; 9 Stat. 871,) and therefore to pay this conceded balance. The various treaties from 1817 down, the legislation, accountings, and proceedings were duly considered in arriving at the result reached. Wright, J., dissented.

We agree that the United States were liable, and think the liability might well be rested on both grounds, that is, that failing one, it could be sustained on the other; but we do not deem it necessary to set forth in our own language what has already been so well stated by Chief Justice Nott and Judges Weldon and Peelle.

2. Recovery of the item of $1,111,284.70 was adjudged "with interest thereon at the rate of five per cent from June 12, 1838, to date of payment," and it is contended that the Court of Claims erred in this allowance of interest.

Under the eleventh article of the treaty of 1846 the Cherokees agreed to submit to the Senate of the United States, as

umpire, the question whether interest should be allowed on the sums found due them. The Senate of the United States, as umpire, on September 5, 1850, found that interest should be allowed, in the following resolution: "Resolved, That it is the sense of the Senate that interest at the rate of five per cent per annum should be allowed upon the sums found due to the Eastern and Western Cherokees, respectively, from the 12th day of June, 1838, until paid."

The Cherokees who had emigrated prior to 1835, with accessions to that date, were known as the "Old Settlers," or "Western Cherokees," and in the case of the *United States* v. *Old Settlers*, 148 U. S. 427, this court said in respect of the claim for interest:

"By the second resolution adopted by the Senate, as umpire, September 5, 1850, it was decided that interest should be allowed at the rate of five per centum per annum upon the sum found due the Western Cherokees, from June 12, 1838, until paid. As before stated, our conclusion is that the sum then found due was less than should have been found by the amount of $212,376.94.

"Under section 1091 of the Revised Statutes, no interest can 'be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest:' and in *Tillson* v. *United States*, 100 U. S. 43; it was held that a recovery of interest was not authorized under a private act referring to the Court of Claims a claim founded upon a contract with the United States, which did not expressly authorize such recovery. But in this case, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself; that determination was arrived at as prescribed, was accepted as valid and binding by the United States, and was carried into effect by the payment of $532,896.90, found due, and of $354,583.25 for interest. (9 Stat. 556, c. 91.)

"In view of the terms of the jurisdictional act and the conclusion reached in reference to the amount due, it appears to us that the decision of the Senate in respect of interest is controlling, and that, therefore, interest must be allowed from June 12, 1838, upon the balance we have heretofore indicated, but not upon the item of $4,179.26, which stands upon different ground."

The Congress of the United States on numerous occasions had recognized the force of the decision of the Senate, and made appropriations accordingly, appropriating the funds due as interest.

On September 30, 1850, Congress appropriated to the Eastern Cherokees, in reimbursing an amount improperly charged the treaty fund for subsistence, the sum of $189,422.76, with the provision:

"That interest be paid on the same at the rate of five per cent per annum, according to a resolution of the Senate of the fifth of September, eighteen hundred and fifty." (9 Stat. 556.)

On February 27, 1851, Congress, in appropriating the amount of the *per capita* then conceded to be due the Eastern Cherokees, to wit, $724,603.37, provided as follows:

"An interest on the above sum, at the rate of five per centum per annum, from the twelfth day of June, eighteen hundred and thirty-eight, until paid, shall be paid to them out of any money in the Treasury not otherwise appropriated." (9 Stat. 572.)

Congress on September 30, 1850, in appropriating the amount of the *per capita*, then conceded to be due the Old Settlers, provided:

"That interest be allowed and paid upon the above sums due respectively to the Cherokees and 'Old Settlers,' in pursuance of the above-mentioned award of the Senate, under the reference contained in the said 11th Article of the Treaty of sixth August, eighteen hundred and forty-six." (9 Stat. 556.)

The question of interest was a "subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself" in 1846, and in the "agreement itself" in 1891, and is the same in principle as in the case of the Old Settlers.

3. Was the recovery given proper destination by the decree?

We refer to the same item, as there is really no controversy over the other three items, and the criticism as to the payment of item three is not material. If no proper agent of the Cherokee Nation to receive the $432.28 can be found, it may be received by the United States as trustee.

The jurisdictional act of March 3, 1903, provided that "both the Cherokee Nation and said Eastern Cherokees, so

called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim mentioned;" and authorized the court "to render a judgment in favor of the rightful claimant, and also to determine, as between the different claimants, to whom the judgment so rendered equitably belongs, either wholly or in part."

In the petition filed by the Cherokee Nation in this case it is declared that the Cherokee Nation is "a body politic," and "is, as such, the 'Cherokee tribe' mentioned in section 68 of the act of Congress aforesaid, [July 1, 1902, 32 Stat. 726,] and authorized thereby to bring this proceeding." But the language of the section is that jurisdiction is conferred to adjudicate "any claim which the Cherokee tribe or any band thereof, arising under treaty stipulations, may have against the United States," and even if it were conceded that the Cherokee Nation could be treated as a body politic, not as a body corporate, but in the sense of a governmental community, we should say "the Cherokee tribe or any band thereof" means the Cherokee people as a people, or any band thereof, and not the Cherokee Nation as a body politic.

It should be observed that the term "Cherokee Nation" has been used as representing the people themselves; the government of the Cherokees; and the Government as trustee for all of its people, or for some of them as their rights might appear.

In the treaty of July 2, 1791, the "Cherokee Nation" was described as "all the individuals comprising the whole Cherokee Nation of Indians." In the treaty of 1835 these Indians are referred to as the "Cherokees" and as "The Cherokee Nation." In the treaty of 1846 as "The Cherokee Nation," "The Cherokee People," and "The Cherokees."

Under the first article of the treaty of 1846 the lands of the Cherokee Nation belonged to the whole Cherokee people. The lands sold east of the Mississippi River belonged to the Cherokee people as then existing as communal property. The Western Cherokees, so called, that is to say, the Old Settlers, were paid for their interest in those lands as communal owners. 148 U. S. 427. They were paid individually, a community within a community.

Mr. Chief Justice Nott treats of this matter thus:

"While the United States have always, or nearly always, treated the members of an Indian tribe as communal owners,

they have never required that all the communal owners shall join in the conveyance or cession of the land. From the necessities of the case, the negotiations have been with representatives of the owners. The chiefs and head men have ordinarily been the persons who carried on the negotiations and who signed the treaty. But they have not formed a body politic or a body corporate, and they have not assumed to hold the title or be entitled to the purchase money. They have simply acted as representatives of the owners, making the cession on their behalf, but allowing them to receive the consideration *per capita*. In the present case the Cherokee Nation takes the place, so far as communal ownership is involved, of the chiefs and head men of the uncivilized tribes. This, too, is consonant with the usage of nations. The claims of individuals against a foreign power are always presented, not by them individually, but by their government. The claims are pressed as international, but the money received is received in trust, to be paid over to the persons entitled to it.

"As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation, and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the West, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita*. The Cherokee Nation was not bound to prosecute their claims against the United States for the unpaid balance of the $5,000,000 fund, but their rights were inextricably interwoven with the rights and equities of the Cherokees who were citizens of the nation, and the nation properly made no distinction when parting with the Outlet, but demanded justice from the Cherokee point of view for all Cherokees who had been wronged by the non-fulfillment of the treaty of New Echota. As to these Eastern non-resident Cherokee aliens the nation acted simply as an attorney collecting a debt. In its hands the moneys would be an implied trust for the benefit of the equitable owners.

"After a careful consideration of the circumstances and conditions of these cases, the court is of the opinion that the moneys awarded should be paid directly to the equitable owners."

And after referring to the present status of the Cherokee Nation as about to terminate, the Chief Justice says:

"In this condition of affairs the court must regard the Cherokee Nation as in a condition somewhat analogous to that of a trustee or receiver who has become insolvent; that is to say, as a person who should not be entrusted with the receipt and distribution of the moneys belonging to other persons."

The Court of Claims decreed that after deducting counsel fees, costs and expenses, the sum of $1,111,284.70, with interest, should be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes of paying costs and expenses as stated, and then distributing the remainder "directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

The eighth finding of fact was as follows:

"The Cherokee Indians who removed west of the Mississippi prior to May 23, 1836, were called 'Western Cherokees.' After the removal, under the treaty of 1835-36, of the Cherokees who had remained in the Cherokee country east of the Mississippi to the lands west of the Mississippi, the term 'Western Cherokees' was no longer distinctive, and the Cherokees who had theretofore been known as such were thereafter popularly known as 'Old Settlers.'

"The Cherokees who were domiciled east of the Mississippi River at the time of the making of the treaty of 1835-36, according to the census just then completed, were thereafter known as 'Eastern Cherokees,' the great body of whom subsequently, in 1838, moved to the lands west of the Mississippi."

So far as the "Old Settlers" are concerned, they have been fully paid and cannot be allowed to participate in this distribution. There had been a settlement with these Cherokees, which was reopened in the Old Settlers case, and they were allowed to assert any and all claims on their part against the United States. Judgment was thereafter rendered as to a portion of these claims in their favor, 148 U. S. 427, which judgment was thereafter paid in full by the United States, so that these Old Settlers have no standing in this action. And, indeed, they never had nor asserted any interest what-

ever in the claim herein involved and are not claimants. In the settlement of 1851, the cost of removal with which they were charged, did not diminish the five million dollar treaty fund but came entirely from the $600,000 added to that fund by the third supplemental article of the treaty of New Echota, and the payment that was made to them pursuant to the fourth article of the treaty of 1846 was not a third of the residuum of the treaty fund, but a sum equal to one-third. It was the Eastern Cherokees only who were interested in that residuum, and so article nine of that treaty provided for payment to the Eastern Cherokees of that balance, and for a fair and just settlement of all moneys due to the Cherokees, and payment of the same *per capita* to the Eastern Cherokees. The Cherokee Nation, as such, had no interest in the claim, but officially represented the Eastern Cherokees.

The act of February 27, 1851, appropriating the amount due on the accounting under article nine of the treaty of 1846, provided that it should be in full satisfaction of all claims and demands of the Cherokee Nation and that a receipt in full should be given. The receipts as given were signed by the individual Eastern Cherokees.

We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to "the Eastern and Western Cherokees," are perhaps liable to misconstruction, although limited to those "who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River." This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835-36 and 1846, and exclusive of the Old Settlers.

In view of the language of the jurisdictional acts of 1902 and 1903 in respect of the Cherokee Nation, we are not disposed to interfere with the Court of Claims in the allowance of fees and costs.

It is true that in the replication of the Cherokee Nation

to the petition of the Eastern Cherokees this paragraph occurs:

"It denies that the Cherokee Nation, in securing the accounting under the agreement of December 19, 1891, did so on behalf of the Eastern Cherokees referred to, and for their exclusive use and benefit; and further denies that if it had collected or hereafter shall collect such moneys, the same would have been or will be in its hands an implied trust for the benefit of the Eastern Cherokees, exclusively or otherwise."

It is also true that by the acts of June 7, 1897, June 28, 1898, and July 1, 1902, the Cherokee Nation was practically incapacitated from acting as trustee, and by section 63 of the Cherokee allotment act, 32 Stat. 725, c. 1375, it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six." But by joint resolution of March 2, 1906, Congress provided as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

Nevertheless, taking the entire record together, the various treaties, and acts of Congress, and of the Cherokee Councils, and the language of the jurisdictional acts of 1902 and 1903, we leave the decree as it is in respect to counsel fees and costs.

4. The Eastern and Emigrant Cherokees, in respect of whom it is stated in their petition, "That they number about 4,500 persons, more or less, all Eastern Emigrant Cherokees, residing for the most part in Cherokee, Graham, Swain, Clay and Macon Counties, North Carolina, some in north Georgia, northern Alabama, and eastern Tennessee, together with about 1,500 emigrants, portions of their various families, gone West, nearly all of whom have been recognized as citizens and who compose a large portion of those persons heretofore known as the Eastern band of Cherokee Indians of North Carolina, and others of the same class, whose names or those of whose ancestors may be found on the rolls of 1835 and 1838," asked that one-fourth part of the whole sum re-

covered be set apart for them as their distributive share. But we think they are only entitled to receive the *per capita* payment with the Eastern Cherokees, and should obtain that payment accordingly.

The result is, that with the modification of the second subdivision of the fourth paragraph of the decree, relating to the $1,111,284.70 with interest, above indicated, the decree of the Court of Claims is

*Affirmed.*

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## MANDATE OF THE SUPREME COURT OF THE UNITED STATES.

COURT OF CLAIMS.

No. 23199.

THE CHEROKEE NATION
*vs.*
THE UNITED STATES.

No. 23212.

THE EASTERN CHEROKEES
*vs.*
THE UNITED STATES.

No. 23214.

THE EASTERN CHEROKEES
*vs.*
THE UNITED STATES and THE CHEROKEE NATION.

I, John Randolph, assistant clerk Court of Claims, hereby certify that the annexed (paged from 1 to 4, inclusive) is a true copy of the mandate of the Supreme Court of the United States, filed in this office in the above-entitled causes on May 15, 1906.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington city this 24th day of May, A. D. 1910.

[Seal of Court of Claims.]

(Signed) JOHN RANDOLPH,
*Assistant Clerk Court of Claims.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America, to the Honorable the Judges of the Court of Claims, Greeting:

Whereas, lately in the Court of Claims before you or some of you, in causes between The Cherokee Nation and The United States, No. 23199; The Eastern Cherokees and The United States and The Cherokee Nation, No. 23214; and The Eastern and Emigrant Cherokees and The United States, No. 23212, wherein the decree of the said Court of Claims, entered in said causes on the 18th day of May, A. D. 1905, is in the following words, viz:

> "The above causes, on motion and by consent of the parties, having heretofore been consolidated for purposes both of hearing and judgment by appropriate order of this court, came on to be heard upon the pleadings, orders, and proofs, and were argued by Messrs. Charles Nagel, Edgar Smith, and Frederick D. McKenney, on behalf of the Cherokee Nation; Messrs. Robert L. Owen and William H. Robeson, on behalf of the Eastern Cherokees; Mrs. Belva A. Lockwood, on behalf of certain individual claimants, styled Eastern and Emigrant Cherokees, and Mr. Assistant Attorney General Pradt, on behalf of the United States; and the court being now sufficiently advised in the premises, it is, this 18th day of May, A. D. 1905, adjudged, ordered, and decreed that the plaintiff, The Cherokee Nation, do have and recover of and from the United States as follows:

"Item 1. The sum of..... $2,125.00

"With interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment.

"Item 2. The sum of..... $1,111,284.70

"With interest thereon at the rate of 5 per cent from June 12, 1838, to date of payment.

"Item 3. The sum of..... $432.28

"With interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment.

"Item 4. The sum of..... $20,406.25

"With interest thereon from July 1, 1903, to date of payment.

the proceeds of said several items, however, to be paid and distributed as follows:

"The sum of $2,125, with interest thereon at the rate of 5 per cent from February 27, 1819, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior in trust for the Cherokee Nation, and shall be credited on the proper books of account to the principal of the 'Cherokee school fund' now in the possession of the United States and held by them as trustees.

"The sum of $432.28, with interest thereon at the rate of 5 per cent from January 1, 1874, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Cherokee Nation, to be received and receipted for by the treasurer or other proper agent of said Nation entitled to receive it.

"The sum of $20,406.25, with interest thereon at the rate of 5 per cent per annum from July 1, 1893, to date of payment, less 5 per cent thereof contracted by the Cherokee Nation to be paid as counsel fees, shall be paid to the Secretary of the Interior and credited on the proper books of account to the principal of the 'Cherokee national fund,' now in the

possession of the United States and held by them as trustees.

"The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the provisions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

"First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

"Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

"So much of any of the above-mentioned items or amounts as the Cherokee Nation shall have contracted to pay as counsel fees under and in accordance with the provisions of sections 2103 and 2106, both inclusive, of the Revised Statutes of the United States, and so much of the amount shown in item numbered two (2) as this court hereafter by appropriate order or decree shall allow for counsel fees and expenses under the provisions of the act of March 3, 1903, above referred to, shall be paid by the Secretary of the Treasury to the persons entitled to receive the same, upon the making of an appropriation by Congress to pay this judgment.

"The allowance of fees and expenses by this court, under said act of March 3, 1903, is reserved until the coming in of the mandate of the Supreme Court of the United States.

"By the COURT."

as by the inspection of the transcript of the record of the said Court of Claims, which was brought into the Supreme

Court of the United States by virtue of separate appeals taken by The United States, The Eastern Cherokees, and The Cherokee Nation, respectively, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said Supreme Court, on the said transcript of record on separate appeals, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the second subdivision of the fourth paragraph of the decree of the said Court of Claims in this cause be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-36 and 1846; and exclusive of the Old Settlers and, as so modified, be, and the same is hereby, affirmed.

APRIL 30, 1906.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeals notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of May, in the year of our Lord one thousand nine hundred and six.

JAMES H. MCKENNEY.
*Clerk of the Supreme Court*
*of the United States.*

## ORDER OF COURT OF CLAIMS, ENTERED MAY 28th, 1906.

IN THE COURT OF CLAIMS.

No. 23199.

THE CHEROKEE NATION,

No. 23214.

THE EASTERN CHEROKEES,

No. 23212.

THE EASTERN AND EMIGRANT CHEROKEES
*vs.*
THE UNITED STATES.

These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court of the United States heretofore presented; and it appearing to the court that by the said mandate it is provided that the second subdivision of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item two of the said decree to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-36 and 1846, and exclusive of the Old Settlers, it is therefore so ordered and decreed.

And in accordance with said decree as it was directed to be, and is now, modified, it is further ordered and decreed that the Secretary of the Interior prepare or cause to be prepared a list or roll of all persons coming within the said description entitled to share in the distribution of said fund; and in preparing the said list or roll of such persons, the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851 upon which the per capita payment to the Eastern Cherokees was made, and

make such distribution in pursuance of Article 9 of the treaty of 1846.

* * * * * * *

(Matters relating to fees of attorneys.)

* * * * * * *

Indorsed: The Cherokee Nation, No. 23199. The Eastern Cherokees, No. 23214. The Eastern and Emigrant Cherokees *vs.* United States, No. 23212. Decree as to fees of counsel. Filed, May 28, 1906, Court of Claims.

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## ORDER OF APRIL 29, 1907.

IN THE COURT OF CLAIMS.

No. 23214.

THE EASTERN CHEROKEES
*vs.*
THE UNITED STATES.

### Order.

This cause coming on to be heard under the order of this court of March 5, 1907, upon the reference of the Secretary of the Interior to the court of February 20, 1907, and upon the petition of Henry C. Meigs and others, filed in said cause, and the court having heard argument and considered the just rights of all persons in interest; and the court having been requested by the Secretary of the Interior, in a letter bearing date of April 10, 1907, to provide for the enrollment of the Eastern Cherokees and the distribution of the fund arising from the judgment in their favor under the direct supervision and authority of the court, and a prayer to this effect being contained in said petition of Henry C. Meigs and others; it is this twenty-ninth day of April, 1907, ordered that that direction of the decree of the court of May 28, 1906, which provides that the Secretary of the Interior shall prepare, or cause to be prepared, a list or roll of all persons entitled to share in the fund arising from said decree,

and to make distribution of said fund, be, and the same is hereby vacated.

It further appearing to the court that the lands disposed of by the Eastern Cherokees under the treaties of 1835-6 and 1846, were owned by them as a community, and the rights arising under said treaties, as established by the decree of May 28, 1906, accrued to the said Eastern Cherokees as communal owners of said land; and it further appearing from the report of Special Agent Guion Miller, accompanying the reference of the Secretary of the Interior of February 20, 1907, above referred to, that a per stirpes distribution to the Eastern Cherokees who were parties to the treaties of 1835-6 and 1846 is impracticable; it is therefore further ordered that the Commissioner hereinafter named shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee Tribe of Indians at the date of the treaty of 1835-6 and 1846, or, are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation; provided further that said persons, pursuant to the notices of the Commissioner of Indian Affairs, bearing dates of August 20, 1906, and February 1, 1907, have filed applications for a share of such fund with the Commissioner of Indian Affairs, or shall file such applications with the Commissioner hereinafter named on or before the thirty-first day of August, 1907.

When the roll of persons entitled to participate in the fund shall have been made by the said Commissioner, as hereinbefore provided, it shall be submitted to the court for its approval.

The records of the Department of the Interior, so far as they relate to the subject matter of these proceedings, shall be accepted by said Commissioner as a part of the record of this case, and all matters of fact ascertained and determined by the Secretary of the Interior, not in conflict with the decrees and orders of this court, shall be accepted and acted upon by said Commissioner as fully and correctly established and determined, except where it may be shown that a mistake of fact has been committed.

It is further ordered that Guion Miller, Esquire, be, and

he is hereby, designated and appointed as Special Commissioner of this court to prepare a roll of all persons entitled under the terms and conditions of the decrees and orders of this court to share as Eastern Cherokees in the fund arising from the decree aforesaid. Said Commissioner shall from time to time proceed to such points in the United States as he may find it necessary and expedient to make a special investigation in the field, and shall have power to summon witnesses, administer oaths, and do everything needful for the proper discharge of his duties as herein set forth. Said Commissioner shall receive, in addition to his necessary traveling expenses when engaged in investigation in the field, compensation at the rate of three hundred and fifty ($350) dollars per month.

Said Commissioner shall have authority, with the approval of the court, to employ such assistants and clerical force as may be found necessary and pay them such compensation as shall be approved by the court. Such assistants, when so authorized and directed by the said special Commissioner, shall in like manner have power to summon witnesses, administer oaths, and take testimony necessary to be taken in the premises.

It is further ordered that all the expenses incurred in carrying into effect the provisions of this decree, together with the expenses already incurred in making publication of said order of March 5, 1907, shall, upon the proper certificate made under oath by said Commissioner, and duly approved by the court, be paid by the Secretary of the Treasury out of the appropriation made by the act of Congress of June 30, 1906, to pay said judgment in favor of the Eastern Cherokee Indians as aforesaid.

It is further ordered that in order to meet the necessary expenses incident to the enrollment herein provided for the said Guion Miller, special Commissioner as aforesaid, be, and he is hereby designated and appointed a special disbursing agent of this court, and shall give bond to the United States in the sum of five thousand dollars ($5,000) for the faithful discharge of his duties as such disbursing agent, and upon the approval of said bond by the court the Secretary of the Treasury is authorized and directed, upon the requisitions of this court from time to time, to pass to the credit of said special Commissioner and special disbursing agent out of the fund appropriated by the act of Congress of

June 30, 1906, to pay the judgment in this cause such sums as may be necessary for the purposes aforesaid. Provided, there shall at no time stand to the credit of said special Commissioner and special disbursing agent a sum in excess of the amount of his official bond as aforesaid.

It is further ordered that copies of this order shall be certified by the clerk of this court to the Secretary of the Interior and the Secretary of the Treasury for their information and guidance.

Indorsed: Original. Court of Claims. No. 23214. The Eastern Cherokees *vs.* The United States. Modification of decree respecting making of roll of Eastern Cherokees. Filed April 29, 1907, Court of Claims.

Office Supreme Court, U. S.
FILED.
FEB 15 1911
JAMES H. McKENNEY,
CLERK.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

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## Original, No. 15.

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IN THE MATTER OF THE EASTERN CHEROKEES,
PETITIONERS.

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## SUPPLEMENTAL BRIEF FOR PETITIONERS.

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JOHN B. DAISH,
JOSEPH D. SULLIVAN,
*Attorneys for Petitioners.*

WASHINGTON, *February* 13, 1911.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

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## Original, No. 15.

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IN THE MATTER OF THE EASTERN CHEROKEES,
PETITIONERS.

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## SUPPLEMENTAL BRIEF FOR PETITIONERS.

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### I.

### Correction of Errors of Fact.

The opening words of the second paragraph of the brief for the petitioners said: "The facts are not disputed and are all matters of record to be found," etc.,—this was supposed to be, and it is now believed is, true. As the brief for the respondent contains internal evidence of disputed facts, it is deemed proper to call the attention of the court thereto; fortunately, all of the matters have heretofore received the attention of this court or are matters of which this court will take judicial notice. These matters are:

*(a.) Who were the "Old Settlers"?*

The determination of this question is of importance, because on it rests the right of those Cherokees who emigrated west under and pursuant to the treaties of 1835-'36 to participate in the distribution of any fund.

At page 6 of the brief for respondent, it is said:

> "The Old Settlers who had removed to the Indian Territory in 1833 strongly objected," etc.

At page 36 of the same brief, it is said:

> "The Eastern Cherokees and the United States were the only parties to the treaty of 1835-'36. The Eastern Cherokees and the Old Settlers were both parties to the treaty of 1846." * * *

These two statements may not appear to be in conflict, but the argument based on the latter statement falls by reason of the improper premise of fact.

This court has heretofore determined that the "Old Settlers" were those Cherokees who emigrated voluntarily west prior to 1835. In the "Old Settlers' Case," 148 U. S., page 478, it is said:

> "The 'Old Settlers', or Western Cherokees, are not a governmental body politic, nor have they a corporate existence, nor any capacity to act collectively. The money belongs to them as individual members of an Indian community, recognized as such by the treaty of 1846, and treated as distinct and separate from the Cherokee Nation, so far as necessary to enable the Government to accord them their treaty rights. They are described in the fourth article of the treaty as *'all those Cherokees west of the Mississippi' who emigrated prior to the treaty of 1835'; and they may be held to include those now living who so emigrated, together with the descendants of those who have died, the succession to be determined by the Cherokee law.*" (Italics ours.)

And the treaty of 1846 in article 4 described the "Old Settlers." Said article reads, in part, as follows:

> "And as it affects the settlement with the Western Cherokees, there shall be no deduction from the fund before mentioned in consideration of any payments which may hereafter be made out of said fund: and as it is hereby further understood and agreed that the principle above defined *shall embrace all those Cherokees west of the Mississippi who emigrated prior to the treaty of 1835.*" (Taken from Old Settlers' Case, 148 U. S., pabe 447. Italics ours.)

As to the parties to the several treaties the treaties themselves show who they were, but this court has interpreted and construed them in United States *vs.* Cherokee Nation, 202 U. S., 101. There it is said:

> "In the treaty of July 2, 1791, the 'Cherokee Nation' was described as 'all the individuals comprising the whole Cherokee Nation of Indians.' In the treaty of 1835 these Indians are referred to as the 'Cherokees' and as 'The Cherokee Nation.' In the treaty of 1846 as 'The Cherokee Nation,' 'The Cherokee People,' and 'The Cherokees.'"

Concerning the parties to the treaty of New Echota, treaty of 1835, and the relation which the Western Cherokees bore to the agreement this court, in "Old Settlers' Case," 148 U. S., page 443, said:

> "The treaty of New Echota was signed by persons purporting to represent the Eastern Cherokees, and assent to its provisions was given by two delegates from the Western Cherokees."

(*b.*) *For what length of time was there advertisement of the proposed hearing by the Court of Claims on the question whether or not the distribution should be per stirpes or per capita?*

At pages 20-21 of the brief for respondent, after some preliminary recital, it is said:

> "Accordingly, on March 5, 1907, the Court of Claims set down for argument on April 8, 1907, the following questions:
>
> "First. Shall the rolls of 1851 be used as the exclusive basis for the present enrollment?
>
> "Second. Shall the distribution be *per stirpes* or *per capita?*
>
> "Third. If *per stirpes,* what disposition shall be made of those portions for which there have been no applications?
>
> "The Court of Claims has fixed Monday, April 8, 1907, for hearing argument upon these questions, when all parties in interest may be represented.
>
> "And directed that notices of the hearing should be published in 21 designated newspapers, published in Indian Territory, Arkansas, Georgia, Mississippi, North Carolina, Tennessee, and Virginia, which order was complied with, and notices were published by Special Agent Miller in said papers for two months, and the hearing was had on the day specified."

It is manifestly impossible for an order entered March 5 to be published two months before April 8.

(*c.*) *When was the jurisdiction of this court invoked in the present controversy?*

The brief for the respondent alleges that the petitioners are guilty of laches, one reason for which being, that the petition herein was not filed promptly. At page 27 thereof, it is said:

> "They [petitioners] did not even file their petition within a reasonable time, under the circumstances, after this court had given them leave to do so, for their motion was allowed May 31, 1910, but their petition was not filed until October 17, 1910, when only 313 of the 30,827 enrolled remained unpaid (Response, p. 1)."

The docket of this court shows that on May 31, 1910, the petitioners submitted a motion, praying "that the court will grant leave to file the petition for a writ of mandamus hereto annexed." The petition herein was annexed and submitted at the same time, also a brief on the right of petitioners to the writ prayed.

No session of this court was held until October following, and on the 17th leave to file the petition theretofore submitted with the motion was granted and rule to show cause issued.

It is clear that, in this behalf, the petitioners acted with all due speed.

## II.

## The Right of Representation is Complete.

The brief for respondent relies with great force on the argument that the petitioners have no right to represent the Eastern Cherokees.

On its face the power of attorney filed herein shows that the petitioners are authorized to represent the Eastern Cherokees; however that may be technically, the several signers, McIntosh, Hilderbrand, Foreman, Hicks, Snell, Boney and Tucker have a right to represent themselves as individuals, as alleged in paragraph 2, page 2, of the Petition.

They claim, by virtue of their office in the Catowah Society, the right to represent "The Eastern Cherokees as a whole residing west of the Mississippi." The brief for the respondent says (page 24) that "There are no such officers

of the Eastern Cherokees, and never were," but adroitly admits "There are, however, such officers of a full-blood Cherokee secret society called the 'Keetoowah Society.'"

It is believed that the Catowah Society and the Keetoowah Society are one and the same organization.

This question of right of individuals to represent a tribe, band or nation is not new in Indian cases; this court has always been liberal in such matters, realizing, no doubt, the want of complete organization of the tribe or nation. The same question was raised in the "Old Settlers' Case," 148 U. S., 427; in reply thereto this court, at page 479, said:

> "The Court of Claims at first decided that the decree should be in the form usually used where a suit is prosecuted by individuals for themselves and others, that is to say, that the general liability should be established, and then provision made for the individual Old Settlers or Western Cherokees to come in and establish their right to share in the fund.
>
> "It was said in Smith *vs* Swormstedt, 16 How., 288, 302, 303, that 'the rule is well established that where the parties interested are numerous and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and all others;' but that 'in all cases where exceptions to the general rule are allowed, and a few permitted to sue, or defend, on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.' And, notwithstanding the suggestion that these so-called commissioners do not bring themselves as strictly within the rule upon this subject as they should, yet we think that they do so far represent the interests or rights involved that the case may be allowed to proceed to judgment."

While not relying on the proposition, it is suggested that in a matter of the kind now before this court the interests of public justice are such that any one (whether or not enti-

tled to participate in the distribution) would have a standing before this court to call its attention to the existing situation in respect to its mandate.

## III.

### The Petitioners Have Not Slept on Their Rights.

The brief for the respondent relies on what it terms the laches of the petitioners.

One of the grounds on which this point is predicated has been hereinbefore answered. The other seeks to show that because the decree entered by the Court of Claims in pursuance of the mandate May 28, 1906, the petitioners did not apply to this court until May 31, 1910; therefore the rights of the petitioners are barred.

While not admitting that four years would in an equitable suit, as this one is, be properly construed as laches (for in many instances much longer times have been held within the rule of limitations), yet it must be remembered that there were continuously during all of that time various orders, proceedings, and actions by the Court of Claims and its Commissioner. The chief matters are as follows:

April 28, 1907.—Further modification of final decree, as modified by mandate.

March 7, 1910.—Denial of exceptions filed by various parties to the roll and the roll as made, approved.

*Within eighty-five* days thereafter the petitioners secured counsel and invoked the jurisdiction of this court for the protection of their rights. Until the roll had been approved, there was uncertainty what the Court of Claims might do. It had modified its orders, had hearings, had advertised and taken various action, some of which in the view of the petitioners were inconsistent with each other. When the final order had been taken the petitioners were then only at liberty to institute the present proceeding.

## IV.

**The petitioners cannot refrain from pointing out a non sequitur in the brief for respondent concerning the term "legal representatives."**

The brief for respondent relies on the presumption that this court intended to omit from the decree the words "or legal representatives."

At the same time, it is stated that the advertisement of the Commissioner of the Court of Claims was erroneous and that it was his offense to include in the advertisement the words "or legal representatives" and attempts now to condone this offense by stating that the Commissioner relied on the opinion of the Attorney General of April 16, 1851, that the term means those in *loco parentis* (page 33).

It seems to have been there forgotten that about a year after the receipt of the mandate of this court the Court of Claims publicly asked, and had argument on the point, whether or not the distribution should be *per stirpes* or *per capita*.

Again, it cannot be supposed that the opinion of the Attorney General in 1851 would outweigh the decisions of this court, the Court of Claims, and other courts. These decisions are mentioned at pages 15-16 of the brief of petitioners.

## V.

**The core of the present controversy is, Did this Court intend to omit from the decree of the Court of Claims the words "or legal representatives"?**

Manifestly not.

The mandate provided:

> "That the second subdivision of the fourth paragraph of the decree of the said Court of Claims in

> this cause be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-'36 and 1846; and exclusive of the Old Settlers."

The language of the opinion in this behalf, which the Court of Claims had a right to consider for the purpose of interpreting the mandate, said:

> "We think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to 'the Eastern and Western Cherokees,' are perhaps liable to misconstruction, although limited to those 'who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Missippi River.' This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835-'36 and 1846, and exclusive of the Old Settlers."

Attention is called to the word *"This"* following the quotation; it clearly and distinctly points out what, and what alone, should be modified.

For convenience the provision of the decree and of the mandate are set out in different type: Decree, Roman; Modification, *Italic*. Matter in brackets '[ ]' was that part of the decree directed to be modified.

> "Second. The remainder to be distributed directly [to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River], *to the Eastern Cherokees, as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835-'36 and 1846, and exclusive of the Old Settlers,* or the legal representatives of such individuals."

The language above in brackets is referred to in the opinion of this court as "This,"—meaning no doubt only that language and nothing more; what precedes and what follows was not by this court mentioned or disturbed. Whether or not this court so intended is the crux of the present matter. And it is for this court, and not the Court of Claims, to interpret and construe a mandate. (Sibbald *vs.* United States, 12 Pet., 488, 493; West *vs.* Brahear, 14 Pet., 51; Supervisors *vs.* Kennicott, 94 U. S., 498; Gaines *vs.* Rugg, 148 U. S., 228, 238, 244.)

In conclusion, it is respectfully submitted, that for the reasons stated in the brief for petitioners and in this brief the mandamus should issue as prayed.

Respectfully submitted,

JOHN B. DAISH,
JOSEPH D. SULLIVAN,
*Attorneys for Petitioners.*

WASHINGTON, *February* 13, 1911.

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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IN THE MATTER OF THE EASTERN CHEROKEES, PETITIONERS.

ORIGINAL, NO. 15.

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## BRIEF IN BEHALF OF THE COURT OF CLAIMS.

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### STATEMENT OF THE CASE.

This is a mandamus suit to determine whether the mandate of this court in the case of the *United States* v. *The Cherokee Nation* (202 U. S., 101–132) directed the Court of Claims to distribute the judgment rendered therein *per capita* or *per stirpes*. We are satisfied ourselves that the mandate clearly directed per capita distribution, but in view of the controversy raised by the petition for mandamus, we think it desirable to interpret the mandate of the court in the light of the facts which caused it to be issued. We will, therefore, review as briefly as possible, consistent with clearness, the history of the Eastern Cherokee claim.

The Cherokee tribe of Indians from time immemorial possessed, according to the usual Indian

title by occupation, a large territory in the States of North Carolina, Tennessee, Georgia, and Alabama. The first treaty ever entered into between the Government and this tribe of Indians was on November 28, 1785 (7 Stat., 18), and was called the "Treaty of Hopewell," by the fourth article of which a portion of the ancient possessions of the Cherokees was set apart by natural boundaries as their future hunting grounds; and from that time to the present day the Cherokees have resided on lands set apart for them by the Government. After the Treaty of Hopewell, owing to the rapid settlement of the country, a number of other treaties were entered into between Cherokees and the Government, changing the boundaries of the reservation and looking to their ultimate removal to lands west of the Mississippi River.

The Cherokees had for a long time been divided into two factions, one of which was desirous of engaging in the pursuit of agriculture and the assumption of the civilization of the whites; the other was equally desirous of adhering to its ancient traditions of primitive independence and of securing a means of livelihood through the chase. So a treaty was entered into between the Government and the Cherokee Nation on July 8, 1817 (7 Stat., 156) by which those Indians who desired to adopt the habits of civilized life should remain at their old home, and those who wished to continue the lives of their ancestors were to remove to what is now the State of Arkansas, where the Government agreed to give them lands in exchange for their eastern lands. In pursuance of

this agreement, about one-third of the Cherokees removed to Arkansas.

The advance of civilization having continued to encroach upon the lands of the Cherokees who had removed to Arkansas, articles of a convention were entered into between the Government and the Cherokees west of the Mississippi River, known as Western Cherokees, on May 28, 1828 (7 Stat., 311), the object of which was to secure to those Indians a permanent home, to relieve them from the intolerable conditions surrounding their residence in Arkansas, and to solve the problem of their removal when the Territory of Arkansas should become a State. By article 2 of the convention the United States agreed to guarantee to them forever 7,000,000 acres of land by natural boundaries and an outlet to the west in what was afterwards Indian Territory, now Oklahoma.

With a view to the ultimate removal of the whole Cherokee Nation to lands west of the Mississippi River, Congress on May 28, 1830 (4 Stat., 411), passed an act entitled "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the River Mississippi," the first section of which provides:

> That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the River Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be

> divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from every other.

And section 3 provides:

> That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States, if the Indians become extinct or abandon the same.

The convention of May 28, 1828, supra, was ratified by the treaty of February 14, 1833 (7 Stat., 414), entered into between the Western Cherokees and the Government, which, after reciting the stipulations of the articles of convention, again set out by natural boundaries the lands to be guaranteed to the said Cherokees west of the Mississippi River. The Western Cherokees on their part agreed to cede all their other lands to the Government.

In pursuance of the agreements of 1828 and 1833, the lands described therein were set apart by the Government for the occupation of the Cherokee Indians, and during the year 1833 the Western Chero-

kees removed from Arkansas to their new home in Indian Territory, where they were afterwards known as Old Settlers.

Two years afterwards the Eastern Cherokees, being desirous of making some arrangement with the Government by which the difficulties they experienced in their residence under the jurisdiction and laws of State governments should be terminated, and with a view to reuniting their people both east and west of the Mississippi River and securing a permanent home for themselves and their posterity, entered into a treaty known as the Treaty of New Echota, on December 29, 1835 (7 Stat., 478), and supplementary treaty on March 1, 1836, of the same name (7 Stat., 488), by which the United States guaranteed to the Eastern Cherokees the same lands in the Indian Territory guaranteed by the treaty of February 14, 1833, to the Old Settlers, containing 7,000,000 acres of land, and the Cherokee Outlet to the west, supposed to contain 6,574,135.14 acres, and in consideration of the sum of $500,000 an additional 800,000 acres east of the Osage lands. The Eastern Cherokees, on their part, ceded to the United States all of their lands east of the Mississippi River in consideration of the sum of $5,000,000, to which was added $600,000 by the supplementary treaty of 1836, making in all $5,600,000.

The United States agreed that the lands granted to the Cherokees by natural boundaries should be included in one patent executed in favor of the Cherokee Nation of Indians by the President of the

United States, according to the provisions of the act of May 28, 1830, supra.

Accordingly, on December 31, 1838, a patent was executed by the President conveying to the Cherokee Nation the two tracts of land described in article 2 of the treaty of New Echota, containing 14,374,135.14 acres, subject to certain conditions, and among them "to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-cited third article, and which condition is that the lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same." (Laws of the Cherokee Nation, 1892, pp. 415–424.)

At the time the patent was executed the main body of the Eastern Cherokees had been removed to their lands in the Indian Territory.

The Old Settlers who had removed to the Indian Territory in 1833 strongly objected to the entrance of the Eastern Cherokees upon what they claimed by the treaties of 1828 and 1833, supra, to be lands exclusively belonging to themselves. This contention proved to be the source of great friction between the two elements of the nation, which was composed of about two-thirds Eastern Cherokees and one-third Old Settlers, and many murders and much violence resulted from this condition of affairs.

In order to harmonize the difficulties existing between the two factions of the Cherokee Nation, on August 6, 1846 (9 Stat., 871), a treaty was concluded

at Washington between the United States and the Eastern Cherokees and Old Settlers, by article 1 of which it was agreed that the lands occupied by the Cherokee Nation in Indian Territory should belong to the whole nation, in accordance with the terms of the patent executed in 1838.

Article 4 recited the decision of a board of commissioners, appointed to adjust the claims and difficulties between the Cherokee people and the United States and the Cherokee people among themselves, that the Old Settlers had no exclusive title to the territory ceded by the United States in the Indian Territory by the treaties of 1828 and 1833, but that the said lands were intended for the use of the whole Cherokee Nation, including the Old Settlers and Eastern Cherokees, but that inasmuch as those lands became common property by the treaty of 1828, the Western Cherokees or Old Settlers, by the equitable operation of the same treaty, acquired a common interest in the lands of the Eastern Cherokees as well as in those occupied by the Old Settlers in the Territory of Arkansas, which was a part of the tribal property of the whole Cherokee people. After providing for the deduction of certain amounts from the sum of $6,600,000, provided by the treaty of 1835–36, the balance should be distributed *per capita* to the Eastern Cherokees and a sum equal to one-third of said balance to the Old Settlers. It was then stipulated by the United States that this decision should go into effect. In consideration of this stipulation on the part of the United States, the Old

Settlers released and quitclaimed to the United States all of their right, title, interest, or claim to lands east of the Mississippi River and to exclusive ownership of the lands ceded to the Western Cherokees by the treaties of 1828 and 1833 and to the Eastern Cherokees by the treaty of 1835, and that the same should remain the common property of the whole Cherokee people, including themselves.

Article V provided:

> It is mutually agreed that the *per capita* allowance to be given to the "Western Cherokees," or "Old Settlers," upon the principle above stated, shall be held in trust by the Government of the United States, and paid out to each individual belonging to that party or head of family, or his legal representatives, *first deducting therefrom the sum of fifty thousand dollars, to be paid to the delegation of that portion of the Cherokee people who are parties to the treaty, to defray the expenses of prosecuting their claims against the Government of the United States, including the late Captain John Rogers.*[1] And it is further agreed that the *per capita* allowance to be paid as aforesaid shall not be assignable, but shall be paid directly to the persons entitled to it, or to his heirs or legal representatives, by the agent of the United States authorized to make such payments.
>
> And it is further agreed that a committee of five persons shall be appointed by the President of the United States, from the party of Old Settlers, whose duty it shall be, in conjunction with an agent of the United States,

[1] The words in italics were struck out by the Senate.

to ascertain what persons are entitled to the *per capita* allowance provided for in this and the preceding article.

Article IX provided:

> The United States agree to make a fair and just settlement of all moneys due to the Cherokees, and subject to the *per capita* division under the treaty of 29th December, 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence, and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation; and the several sums provided in the several articles of the treaty, to be invested as the general funds of the nation; and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over, *per capita*, in equal amounts, to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835, and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto.

Article X provided:

> It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or

abridge any rights or claims which the Cherokees now residing in States east of the Mississippi River had, or may have, under the treaty of 1835 and the supplement thereto.

The Congress on September 30, 1850 (9 Stat., 544, 555), made an appropriation for part of the amount provided by the treaties of 1835–36 and 1846 and directed that the distribution thereof should be made *per capita*. The balance to be distributed was appropriated by the act of February 27, 1851 (9 Stat., 570, 572, 573). Doubts having arisen in the mind of the Secretary of the Interior as to whether the appropriation should be distributed *per capita* or *per stirpes*, he asked for an opinion from the Attorney General upon that question. On April 16, 1851, the Attorney General rendered an opinion (5 Op. Atty. Gen., 320–333) in which he held that in order to fulfill the treaty stipulations it was necessary that the distribution of the appropriation should be made *per capita* to both the Eastern Cherokees and the Old Settlers; that the words used in Articles V and IX "legal representatives," when addressed to tribal Indians, meant persons who stood in *loco parentis;* that the Cherokees still remaining east of the Mississippi were not required as a condition precedent to participation in the distribution to remove to Indian Territory.

After the receipt of the opinion of the Attorney General a roll was made in 1851 of the Eastern Cherokees and the Old Settlers and the appropriation was distributed to them *per capita*. For the Eastern Cherokees the roll made in 1835 and mentioned in the

treaty of that date was taken as the basis for the enrollment in 1851, and only the parties to that treaty and their descendants living at the time of the making of the roll in 1851 were placed thereon. All other Cherokees not parties to the treaty of 1835 living in the Cherokee Nation in 1851 appear to have been enrolled as Old Settlers. However enrolled, both Eastern Cherokees and Old Settlers were paid *per capita* in 1851 and 1852, the Old Settlers receiving a sum equal to one-third of the amount received by the Eastern Cherokees after the deduction of certain amounts. Out of the amount guaranteed to the Eastern Cherokees by the treaty of 1835, over a million dollars was withheld for the cost of their removal from North Carolina, Tennessee, Georgia, and Alabama. The Eastern Cherokees always contended that this charge for removal was erroneously made.

### OLD SETTLERS' CASE.

On February 25, 1889 (25 Stat., 694), jurisdiction was conferred on the Court of Claims for the adjudication of the claim of the Old Settlers or Western Cherokees accruing out of treaty stipulations and acts of Congress relating thereto, and the court was given "unrestricted latitude in adjusting said claim." On March 8, 1889, suit was filed on behalf of the Old Settlers in the Court of Claims for the value of two-thirds of the territory ceded by the United States to the Western Cherokees by the treaties of 1828 and 1833, and to the Eastern Cherokees by the treaty of 1835, the lands on which the Cherokee Nation was

then residing in Indian Territory, or in the alternative, certain sums of money to which they claimed they were entitled under article 4 of the treaty of 1846, but which they had not received at the payment in 1851 and 1852. They claimed that they were induced to enter into the treaty of 1846 and surrender two-thirds of their interest in said lands, by fraud and duress.

The Court of Claims held that under the jurisdictional act it was not authorized to go beyond the treaty upon the ground that it had been procured by fraud or duress. That it was the purpose of the treaty of 1846 that the Western Cherokees should surrender their separate sovereignty and sell an undivided two-thirds of their lands in the Indian Territory in consideration of one-third of the price which had been paid the Eastern Cherokees under the treaty of New Echota for the lands east of the Mississippi River. The Court of Claims, however, on November 30, 1891 (27 C. Cls., 1–61), held that they were entitled to over $800,000 under Article IV of the treaty of 1846.

The judgment of the Court of Claims in the case of the Old Settlers was affirmed by this court April 3, 1893, with several small modifications of the account as stated by that court (148 U. S., 427, 481).

It has been claimed by the petitioners in this case that the judgment of the Court of Claims in the Old Settlers case was distributed *per stirpes* taking the roll of 1851 as a basis. If such was the case there was no authority in the opinion of the Court of Claims

or this court for such distribution. In fact, the opinion of this court clearly called for a *per capita* distribution, as we will show later on.

THE SLADE AND BENDER ACCOUNT.

Under the authority contained in the act of March 3, 1893 (27 Stat., 640), ratifying the agreement between the United States and the Cherokee Nation of December 19, 1891, the Commissioner of Indian Affairs was authorized under the direction of the Secretary of the Interior to employ experts to render a complete account to the Cherokee Nation of moneys due said nation as required by the fourth subdivision of article 2 of the agreement.

Thereafter James A. Slade and Joseph T. Bender were employed as such experts, who rendered an account which was approved by the Cherokee national council December 1, 1894, and reported to Congress by the Secretary of the Interior on January 7, 1895. In the account it was stated that $2,025,-310.83 should have been paid to the Eastern Cherokees in 1852, but that only $914,026.13 was actually distributed to them at that time, to 14,098 Eastern Cherokees in the West and 2,133 Eastern Cherokees who remained East, leaving a balance of $1,111,284.70 still due to the Eastern Cherokees.

EMPLOYMENT OF ATTORNEYS.

Section 68 of the act of July 1, 1902 (32 Stat., 725), authorized the Cherokee Nation to bring suit in the Court of Claims on any claim which the nation, or any band thereof, might have against

the United States arising under treaty stipulations, and provided that such suit should be prosecuted through attorneys *to be employed and compensated in the manner prescribed by sections 2103 to 2106, inclusive, of the Revised Statutes*, the tribe acting through its principal chief in the employment of such attorneys. (Italics ours.)

On January 16, 1903, Finkelnberg, Nagel & Kirby and Edgar Smith were employed by Thomas M. Buffington, principal chief of the Cherokee tribe, as attorneys to bring such suit, and the suit was brought by them on February 20, 1903. (*The Cherokee Nation* v. *The United States*, No. 23199.)

The prosecution of the suit by the Cherokee Nation was directed to the establishment of the right of the nation as an entity to collect the amount claimed to be due on behalf of the various component elements of the nation, including the Old Settlers, as against the claim of the Eastern Cherokees to the exclusive benefit of the recovery of the amount withheld from them in the payment of 1852. Therefore, in view of conflicting claims, Congress passed an act permitting the Eastern Cherokees to employ their own counsel, by a clause in the Indian appropriation act of March 3, 1903 (32 Stat., 982, 996), amending section 68 of the act of July 1, 1902, supra, so that said section—

> shall be so construed as to give to the Eastern Cherokees, so called, including those in the

> Cherokee Nation and those who remained east of the Mississippi River, acting together or as two bodies, as they may be advised, the status of a band or bands, as the case may be, for all the purposes of said section: *Provided, That the prosecution of such suit on the part of the Eastern Cherokees shall be through attorneys employed by the proper authorities,* their compensation for expenses and services rendered in relation to such claim to be fixed by the Court of Claims upon the termination of such suit; and said section shall be further so construed as to require that both the Cherokee Nation and said Eastern Cherokees, so called, shall be made parties to any suit which may be instituted against the United States under said section upon the claim. * * * (Italics ours.)

The act then proceeds to give the Court of Claims the right to recover judgment in favor of the original claimant and to determine between the different claimants to whom the judgment equitably belonged, either wholly or in part.

The Eastern Cherokees, by their proper authorities, employed Messrs. John Vaile and Robert L. Owen to prosecute their suit, which was instituted in the Court of Claims as *Eastern Cherokees* v. *United States* (No. 23214).

Certain other Eastern Cherokees employed Mrs. Belva Lockwood as their attorney, who instituted another suit in the Court of Claims entitled "*Eastern and Emigrant Cherokees* v. *The United States* (No. 23212)."

These three suits were afterwards consolidated.

The attorneys employed by the Eastern Cherokees, so far as the record in the various cases shows, still remain the attorneys in those cases, and there is nothing to show that the petitioners in this case were ever employed by the proper authorities of the Eastern Cherokees.

### CASE OF THE CHEROKEE NATION AND EASTERN CHEROKEES.

The consolidated suit of the Cherokee Nation and the Eastern Cherokees was decided by the Court of Claims on March 20, 1905 (40 C. Cls., 252), and judgment was rendered in favor of the Cherokee Nation, three amounts ranging from over $400 to over $20,000 for the Cherokee Nation in its own right, and $1,111,284.70, with interest from June 12, 1838, until payment, for the benefit of the individual Eastern Cherokees. The Court of Claims said:

> "The decree will also provide for the payment of the fund to the parties *per capita*, the charge of distribution likewise to be a charge upon the fund" (pp. 331, 332).

On May 18, 1905, a decree was entered by the Court of Claims on the judgment, which after disposing of the amounts allowed to the Cherokee Nation in its own right, directed that—

> The sum of $1,111,284.70, with interest thereon from June 12, 1838, to date of payment, less such counsel fees as may be chargeable against the same under the pro-

visions of the contract with the Cherokee Nation of January 16, 1903, and such other counsel fees and expenses as may be hereafter allowed by this court under the provisions of the act of March 3, 1903 (32 Stat., 996), shall be paid to the Secretary of the Interior, to be by him received and held for the uses and purposes following:

First. To pay the costs and expenses incident to ascertaining and identifying the persons entitled to participate in the distribution thereof and the costs of making such distribution.

Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

The case afterwards came up on appeal to this court, where the judgment of the Court of Claims was affirmed on April 30, 1906. (202 U. S., 101–132.) The court said that so far as the Old Settlers were concerned they had been fully paid in the settlement of 1852, and in the judgment of the court in the Old Settlers case (148 U. S., 427), and that "they never had, nor asserted, any interest whatever in the claim herein involved and are not claimants." That the Eastern Cherokees alone were interested in the balance of the fund provided by the treaty of 1835, with-

held in 1852 to reimburse the expenses of their removal, and that—

> Article 9 of that treaty [of 1846] provided for payment to the Eastern Cherokees of that balance, and for the fair and just settlement of all moneys due to the Cherokees and payment of the same *per capita* to the Eastern Cherokees. The Cherokee Nation as such, had no interest in the claim, but officially represented the Eastern Cherokees (pp. 129, 130).

The court, however, afterwards said that notwithstanding these facts there might perhaps be some misconstruction of the language used by the Court of Claims in its decree, and in order to render the decree perfectly clear, said:

> We concur with the Court of Claims in the wisdom of rendering judgment in favor of the Cherokee Nation, subject to the limitation that the amount thereof should be paid to the Secretary of the Interior to be distributed directly to the parties entitled to it, but we think that the terms of the second subdivision of the fourth paragraph of the decree, in directing that the distribution be made to "the Eastern and Western Cherokees," are perhaps liable to misconstruction, although limited to those who were parties either to the treaty of New Echota as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River." This should be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi,

> parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers (pp.130, 131).

Thereupon, on the same day, a mandate was issued by this court addressed to the judges of the Court of Claims, which, after reciting the decree of that court, directed that—

> On consideration whereof, it is now here ordered and adjudged by this court that the second subdivision of the fourth paragraph of the decree of the said Court of Claims in this cause be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers and, as so modified, be, and the same is hereby, affirmed.

On May 28, 1906, the Court of Claims, in accordance with the mandate of this court, modified its decree of May, 1905, as follows:

> These consolidated causes came on to be further heard upon the motion of the attorneys for the Eastern Cherokees for the modification of the original decree of May 18, 1905, in accordance with the mandate of the Supreme Court of the United States, heretofore presented; and it appearing to the court that by the said mandate it is provided that the second subdivision of the fourth paragraph of the said decree be modified so as to direct the distribution of the fund described in item 2 of the said decree to be made to the Eastern Cherokees as individuals, whether east or west

> of the Mississippi River, parties to the treaties of 1835–36 and 1846, exclusive of the Old Settlers, it is therefore so ordered and decreed.

Thereupon it was, by the Court of Claims—

> Ordered and decreed that the Secretary of the Interior prepare, or cause to be prepared, a list or roll of all persons coming within the said description entitled to share in the distribution of said fund; and, in preparing the said list or roll of such persons, the Secretary of the Interior shall accept as a basis for the distribution of said fund the rolls of 1851, upon which the *per capita* payment to the Eastern Cherokees was made, and make such distribution in pursuance of article 9 of the treaty of 1846.

Some time in February, 1907, Guion Miller, Esq., was appointed by the Secretary of the Interior special agent to prepare, under his supervision, a roll of the Eastern Cherokees in accordance with the mandate of this court. On February 18, 1907, Mr. Miller reported to the Secretary of the Interior that the making of a roll *per stirpes* was impracticable, and suggested the advisability of referring to the Court of Claims the question as to whether the mandate of this court directed a *per stirpes* or a *per capita* distribution of the judgment. On February 20, 1907, the Secretary of the Interior referred the question to this court. Accordingly, on March 5, 1907, the Court of Claims set down for argument on April 8, 1907, the following questions:

> First. Shall the rolls of 1851 be used as the exclusive basis for the present enrollment?

> Second. Shall the distribution be *per stirpes* or *per capita*.
>
> Third. If *per stirpes*, what disposition shall be made of those portions for which there have been no applications?
>
> The Court of Claims has fixed Monday, April 8, 1907, for hearing argument upon these questions, when all parties in interest may be represented.

And directed that notices of the hearing should be published in 21 designated newspapers, published in Indian Territory, Arkansas, Georgia, Mississippi, North Carolina, Tennessee, and Virginia, which order was complied with, and notices were published by Special Agent Miller in said papers for two months, and the hearing was had on the day specified.

On April 10, 1907, the Secretary of the Interior requested the Court of Claims to assume the supervision of the making of the roll, and with the consent of the attorneys representing the different parties to the suit, the court on April 29, 1907, vacated its order directing the roll to be made under the supervision of the Secretary of the Interior and assumed the supervision itself, and appointed Mr. Guion Miller, special commissioner of the Court of Claims to prepare said roll. The order in part is as follows:

> It further appearing to the court that the lands disposed of by Eastern Cherokees under the treaties of 1835–36 and 1846, were owned by them as a community, and the rights arising under said treaties, as established by the decree of May 28, 1906, accrued to the said Eastern Cherokees as communal owners of

said land; and it further appearing from the report of Special Agent Guion Miller, accompanying the reference of the Secretary of the Interior of February 20, 1907, above referred to, that a *per stirpes* distribution to the Eastern Cherokees who were parties to the treaties of 1835–36 and 1846 is impracticable; it is therefore further ordered that the commissioner hereinafter named shall enroll, as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians, by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee Tribe of Indians at the date of the treaty of 1835–36 and 1846, or, are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation; provided further that said persons, pursuant to the notices of the Commissioner of Indian Affairs, bearing dates of August 20, 1906, and February 1, 1907, have filed applications for a share of such fund with the Commissioner of Indian Affairs, or shall file such applications with the commissioner hereinafter named on or before the 3d day of August, 1907.

The special commissioner, under the direction of the court, prepared the roll of the Eastern Cherokees, to which numerous exceptions were filed and fully argued in the Court of Claims by the attorneys representing the interested parties. On March 7, 1910, the roll as made and corrected was approved by the

Court of Claims, at which time an opinion was rendered setting forth the basis of the enrollment and the reasons why the distribution of the judgment should be *per capita*.

After the approval of the roll, Guion Miller, Esq., was designated by the Court of Claims as special commissioner to receive from the Treasury Department the warrants for the persons enrolled and to visit the places where the Indians resided and deliver said warrants to the persons entitled, which was done.

After all but 313 of the 30,827 persons on the Eastern Cherokee roll had received their warrants from the special commissioner of the court, the attorneys in this case, Messrs. Daish and Sullivan, on October 17, 1910, filed their petition for the writ of mandamus. These attorneys have filed as their authority for taking such action a power of attorney signed by six individual Cherokees, five of whom have received warrants for their shares of the per capita distribution of the judgment as shown by receipts in full, and the other one, an Old Settler, not entitled to participate in the distribution. (Response, p. 2.)

## ARGUMENT.

### Attorneys for petitioners have no authority to bring this suit.

The attorneys for the petitioners have not exhibited sufficient authority to entitle them to bring this suit for the writ of mandamus to compel the Court of Claims to alter its construction of the mandate of this court.

The original attorneys who were appointed by the proper authorities of the Eastern Cherokees in accordance with the act of March 3, 1903, supra, have not been discharged from their employment. They were present and participated in the argument before the Court of Claims, as to whether the payments should be made *per capita* or *per stirpes*, on April 8, 1907, and after the issuance of the order of April 29, 1907, directing *per capita* payments, took no further action in the matter.

By the act of March 3, 1903, the Eastern Cherokees were constituted a band for the purposes of their suit against the Government. They were empowered to employ attorneys through their proper authorities. The attorneys for the petitioners were not employed by the proper authorities of the Eastern Cherokees. Their alleged employment was through a power of attorney signed by six individual Cherokees, five of whom were enrolled by the special commissioner of the Court of Claims, received their *per capita* shares of the judgment and signed receipts in full. The other signer was an Old Settler, and not entitled to share in the distribution of the judgment. The first signer, designated as "head captain," was the Old Settler. The second signer is designated as "second captain." There are no such officers of the Eastern Cherokees, and never were. There are, however, such officers of a full-blood Cherokee secret society called the "Keetoowah Society."

The Eastern Cherokees, for the prosecution of their suit against the United States, were to all intents and

purposes a tribe, and their acceptance of the order of the court of April 29, 1907, directing a *per capita* distribution of the judgment, was a tribal act which, as was said by this court in *Wiggan* v. *Conolly* (163 U. S., 56), "no individual was at liberty to challenge."

**The petitioners are guilty of laches.**

If, however, for the purposes of argument, we should admit that this suit has been brought by proper authority, the petitioners are guilty of laches of the grossest character in not having taken their action sooner.

In pursuance of the order of the Court of Claims of March 5, 1907, notice of a hearing on April 8, 1907, of the question of whether the decree as modified by the mandate of this court directed a *per capita* or a *per stirpes* distribution was advertised extensively in the States and counties where the persons interested resided, after which the hearing took place as advertised on April 8, 1907, when all parties interested were represented. Thereafter, on April 29, 1907, the order of the Court of Claims was issued appointing a special commissioner of that court to make the roll and directing the *per capita* distribution of the judgment.

If the Eastern Cherokees had not been satisfied with the order of April 29, 1907, their attorneys should within the statutory period of 90 days have filed an application for an appeal from the order to this court, or in the alternative within a reasonable time, which, we think by analogy, should also have been within 90

days, have filed their petition for a writ of mandamus directing the Court of Claims to alter its method of distribution.

Mr. Justice Gray, who delivered the opinion of this court in *In re Sandford Fork and Tool Co., petitioner* (160 U. S., 247, 259), said:

> If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. (*Perkins* v. *Fourniquet*, 14 How., 313, 330; *In re Washington & Georgetown Railroad*, 140 U. S., 91; *City Bank* v. *Hunter*, 152 U. S., 512; *City Bank, petitioner*, 153 U. S., 246.) But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. (*Hinckley* v. *Morton*, 103 U. S., 764; *Mason* v. *Pewabic Co.*, 153 U. S., 361; *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 5 U. S., App., 97.) The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. (*Sibbald* v. *United States*, 12 Pet., 488, 493; *West* v. *Brashear*, 14 Pet., 51; *Supervisors* v. *Kennicott*, 94 U. S., 498; *Gaines* v. *Rugg*, 148 U. S., 228, 238, 244.)

The petitioners, however, slept upon their rights, if they had any, and neither appealed from the order of the Court of Claims nor filed their petition for mandamus within a reasonable time, but waited until practically the entire judgment of over $4,000,000 had been distributed *per capita*. They did not even file their petition within a reasonable time, under the circumstances, after this court had given them leave to do so, for their motion was allowed on May 31, 1910, but their petition was not filed until October 17, 1910, when only 313 of the 30,827 enrolled remained unpaid. (Response, p. 1.)

Where a roll had been made and the judgment of the Court of Claims had been distributed by the Secretary of the Interior in a previous case, and it was afterwards discovered that 272 names of Indians entitled to be enrolled had been omitted, this court held in the second Pam-to-pee case (187 U. S., 371–383) that they were guilty of laches and had lost their right to participate in the distribution of the judgment.

**Per capita payments in 1852 not equivalent to per stirpes payments of that date.**

The initial and we may say the fundamental error of the petitioners, because their whole case is based upon it, arises out of their assumption that the *per capita* payments in 1852 to the Eastern Cherokees and the Old Settlers were equivalent to *per stirpes* payments.

In making up the roll of the Eastern Cherokees in 1851 the roll of 1835 was taken as a basis, and the

names of those persons appearing upon that roll and their decendants living in 1851 were enrolled. This action of the Secretary of the Interior, who made up the roll of 1851, did not give it the effect of a *per stirpes* roll, because large numbers of Eastern Cherokees who appeared upon the roll of 1835, and whose rights accrued on June 12, 1838, when the main body arrived in Indian Territory, died prior to 1851, and many children were born between 1838 and 1851.

For the same reason the roll of the Old Settlers in 1851 could not have had the effect of a *per stirpes* roll, because their rights accrued under the treaty of August 6, 1846, to participate in the compensation for the lands ceded to the United States by the Eastern Cherokees.

Before making the payments begun in 1851 and completed in 1852, the Secretary of the Interior called on the Attorney General for an opinion, which was rendered on April 16, 1851 (5 Op. Atty. Gen., pp. 320, 333), in which he held that in order to fulfill treaty stipulations and the provisions of the appropriation act of September 30, 1850, supra, which directed per capita payments, the Eastern Cherokees living both east and west of the Mississippi River and the Old Settlers should be paid *per capita*. He said in substance that the term "legal representatives," used in Articles V and IX of the treaty of 1846, was intended to designate persons standing in *loco parentis;* that—

> To attempt to apply to those Indians any nice doctrines of distribution, as ordered by

> this or that of the several States of our Union, of vested rights, or rights vested in each individual Indian at the date of the one or the other of these treaties, and thence to be traced and claimed, *per stirpes*, through a line of regular descent, inheritance, or representation of persons "born in lawful wedlock," are ideas inapplicable to the known condition of an Indian tribe. The attempt to act upon them, in this instance, would lead to endless difficulty, delay, and confusion, and would, moreover, violate the substantial purposes and intentions of the treaties and the laws.

The opinion of the Attorney General is in line with the opinion of this court in the case of *Fleming* v. *McCurtain* (215 U. S., 56), in which certain individual members of the Choctaw Nation, who had been refused enrollment by the Commission to the Five Civilized Tribes, claimed that they had a vested interest in the Choctaw tribal lands and funds under the provisions of the treaty of September 27, 1830 (7 Stat., 333), and the terms of the patent issued thereunder, which conveyed certain lands described therein to the Choctaw Nation in fee simple to them and their descendants to inure to them while they should exist as a nation and live thereon. The court, after stating that legal terms should not be taken in their technical sense when addressed to the Indian mind, held that the lands and funds of the Choctaw Nation were communal lands and tribal funds in which no individual member of the nation had a vested right.

The attorneys for the claimants, in their brief, at page 12, have quoted part of a paragraph from the

case of the Old Settlers, supra, at page 479, which we quote in full:

> The lands west of the Mississippi were held as communal property, not vested in the Cherokees as individuals, as tenants in common or joint tenants; but by the treaties of 1835 and 1846 the communal character of the property was terminated as to both Eastern and Western Cherokees, and the fund, taking the place of the realty, was invested in the various ways we have mentioned, leaving the remainder to be distributed *per capita*. The Western Cherokees were paid under the treaty of 1846, *simply as citizens of the Cherokee Nation*, entitled to receive the money, as having emigrated prior to 1835, *or the descendants of such*. (Italics ours.)

The above extract clearly shows that this court intended that its judgment in that case should be distributed *per capita* to the Old Settlers. This is shown conclusively by another paragraph of the opinion at pages 474 and 475:

> We concur in the rejection of the claim for $30,000, which finds its basis in a resolution of a council of the Western Cherokees of November 16, 1846, asking the Government to appropriate that sum to pay off damages and losses alleged to have been sustained by individual Indians in being compelled to leave their homes and go to the States for safety. No such claimants appear or are represented here, *and the claim has no relation to per capita distribution*. There is no color for its revival in this proceeding. (Italics ours.)

It is claimed, however, by the attorneys for the petitioners that the judgment was distributed by the Secretary of the Interior *per stirpes*, but as the basis of the roll under which they were paid was the roll of 1851 that was clearly impossible, as a strictly *per stirpes* roll could not have been made from the roll of 1851.

Mr. Miller, when he was acting as special agent of the Secretary of the Interior in making appropriations for a roll of the Eastern Cherokees, stated that it was impracticable to make such a roll, even with the assistance of the rolls of 1835 and 1851, because the roll of 1835 was incomplete, as it gave only the names of heads of families, with the number in each family, without giving their names. (Response, p. 10.)

**The Court of Claims has the right to supervise the distribution of its own judgment.**

The attorneys for the petitioners on page 20 of their brief have made the statement that—

> The commissioner of the Court of Claims interpreted the decree of that court entered May 28, 1906, as providing for a *per stirpes* distribution and made known his interpretation by public advertisements to the claimants. This appears from the special report of said commissioner to that court under date of February 4, 1910, printed as an appendix to the opinion of the court of March 7, 1910. (44 Ct. Cls., ---.)

The report referred to is attached to the response of the Court of Claims filed in this case, two paragraphs

of which have been brought together so as to make it appear that an advertisement published on August 20, 1906, was a part of the notice of the Court of Claims of March 5, 1907, published in various newspapers notifying the Eastern Cherokees that April 8, 1907, had been set for a hearing as to whether the payments should be made *per capita* or *per stirpes*. The whole of the first paragraph quoted reads as follows:

> Immediately upon my appointment as special agent of the office of Indian Affairs I prepared a notice in the name of the commissioner, which bore date of August 20, 1906, to all Eastern Cherokees to file their applications for participation in the fund with the Commissioner of Indian Affairs by January 31, 1907. This advertisement set forth that the rolls of 1851, upon which the *per capita* payment to the Eastern Cherokees was made, would be accepted as a basis and the fund would be distributed to the individuals named in said rolls of 1851 or to their legal representatives.

After nearly a page of other matter the report then reads:

> When in February, 1907, the Secretary of the Interior referred the question of whether the payment should be made *per stirpes* or *per capita* to the Court of Claims, the court entered an order giving notice of the questions raised, which order was published in the following papers:

Then follows a list of 21 newspapers published in Oklahoma, Arkansas, North Carolina, Tennessee, and Georgia.

After the hearing advertised the Court of Claims on April 29, 1907, issued its order directing *per capita* payments.

The only offense of the special agent of the Secretary of the Interior was that in his advertisement of April 20, 1906, he used the words "legal representatives" which had been construed by the Attorney General, on April 16, 1851, as meaning those who stood in *loco parentis* for minors or incompetent members of the Eastern Cherokees.

However, the Court of Claims has the exclusive right to construe its own decrees subject to the right of review by this court on appeal. While it has been the uniform practice of the Court of Claims to render judgment in Indian cases and direct the Secretary of the Interior to distribute them, this duty did not empower him to construe the decree under which the rolls were made. For a long time it was held by the Court of Claims that it could only render judgments for an aggregate amount in favor of a tribe or class of Indians and that the Secretary of the Interior had exclusive jurisdiction to make up the rolls and establish the identity of Indians entitled to be enrolled (*Journeycake* v. *Cherokee Nation*, 31 C. Cls., 140, 143, 144).

It is well-established law that in the distribution of appropriations of Congress by the Secretary of the Interior to tribal Indians the acts of the secretary are not subject to review by the courts, but this is not true in the distribution of judgments of the Court

of Claims when the secretary simply acts as an officer of the court.

In the case of the Eastern Cherokees the order of the Court of Claims directing the Secretary of the Interior to prepare the roll was vacated at the request of the secretary and with the consent of the authorized attorneys representing the Eastern Cherokees, though this was unnecessary. The Court of Claims afterwards appointed Mr. Miller, who had been special agent of the Interior Department, special commissioner of that court to prepare the rolls. This it had authority to do in the first place, and this it had authority to do by modifying its decree for that purpose. That part of the decree of May 18, 1905, and that part of the modified decree of May 28, 1906, formed no part of the mandate of this court. This court in the case of *Phineas Pam-to-pee* v. *The United States* (148 U. S., 691, 705), speaking of the Pottawatomie Indians in Michigan and Indiana and referring to the case of the Old Settlers where the Secretary of the Interior had also made the roll, said:

> As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable, by the head, and as such has been the practice of the Government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the Government in paying out the fund. (*United States* v. *Old Settlers, ante,* 427.)

In the case of *Pam-to-pee* v. *United States* (187 U. S., 371, 383), known as the second Pam-to-pee case, this court held that the Court of Claims had the right not only to render judgment in the aggregate and determine the class in whose favor it should be rendered, but also to identify the individuals who were entitled to be placed upon the rolls, and in conclusion said:

> It follows from these considerations that the Court of Claims not only had jurisdiction to find the amount due from the United States to the Pottawatomie Indians of Michigan and Indiana and render judgment therefor, but also to inquire into the question whether that judgment had been duly and properly executed.

Finaliy Congress stamped with its approval the distribution of the judgment by the Court of Claims instead of the Secretary of the Interior by an item in the legislative, executive and judicial appropriation act, approved March 4, 1909 (35 Stat., 845, 938, 939):

> That the general deficiency appropriation act of June thirtieth, nineteen hundred and six, so far as the same provides for the payment of item two of the judgment of the Court of Claims of May eighteenth, nineteen hundred and five, in favor of the Eastern Cherokees, shall be so construed as to carry interest on said item two up to such time as the roll of the individual beneficiaries entitled to share in said judgment shall be finally approved by the Court of Claims, and for the payment of said interest a sufficient sum is hereby appropriated.

**The mandate of this court directed a per capita distribution of the judgment.**

The second subdivision of the fourth paragraph of the decree of the Court of Claims of May 18, 1905, reads:

> Second. The remainder to be distributed directly to the Eastern and Western Cherokees, who were parties either to the treaty of New Echota, as proclaimed May 23, 1836, or the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals.

This court directed that it—

> be modified so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi River, parties to the treaties of 1835–36 and 1846, and exclusive of the Old Settlers.

The Eastern Cherokees and the United States were the only parties to the treaty of 1835–36. The Eastern Cherokees and the Old Settlers were both parties to the treaty of 1846. The decree of the Court of Claims which directed distribution to the Eastern and Western Cherokees who were parties either to the treaty of 1836 *or* the treaty of 1846 as individuals was perhaps susceptible to misconstruction. This court, in view of the fact that the Court of Claims had directed the Secretary of the Interior to distribute the fund, determined to make it perfectly clear that the Old Settlers were not entitled to participate. There-

fore the words "Western" and "either" were stricken out, and the word "and" was substituted for "or," so as to read "the treaties of 1835–36 *and* 1846," and the words "and exclusive of Old Settlers" were added. The words "or to the legal representatives of such individuals," which were used in both articles 5 and 9 of the treaty of 1846, and had no relation to the distinction between Eastern Cherokees and Old Settlers, were also stricken out.

Had this court construed the decree of the Court of Claims as directing a *per stirpes* distribution of the judgment, the modification of the decree would have been unnecessary because the Eastern Cherokees acquired by the treaty of 1835–36 their right to the fund of $5,000,000 provided for distribution by Article 9 of the treaty of 1846, and their right matured on June 12, 1838, when as a body they removed to Indian Territory, and interest was allowed from that date on the judgment as affirmed by this court for the balance withheld to reimburse expenses of removal. Therefore, a *per stirpes* roll could only have been properly made by taking the roll of 1835 as a basis, and the Eastern Cherokees entitled to participate in the judgment would then have been identified and distinguished from the Old Settlers without the modification directed by this court. A *per stirpes* roll could not have been made by taking the roll of 1851 alone as the basis, for reasons heretofore given, but a *per capita* roll could have been and was made by taking that roll as a basis.

For the same reasons, if a *per stirpes* roll had been directed by the decree of the Court of Claims or its modification as ordered by this court, it would also have been unnecessary to state that the Eastern Cherokees were entitled to participate "whether east or west of the Mississippi River."

In addition to what we have said, the words "or to the legal representatives of such individuals," the only possible excuse for an argument in favor of a *per stirpes* distribution, were stricken out of the decree by this court.

In the case of *In re Sandford Fork and Tool Company, petitioner, supra*, this court said: "The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate," and this, as we interpret it, applies with equal force to the opinion of the Court of Claims, where it has been suffered to remain undisturbed by this court on appeal.

The Court of Claims, in speaking of the beneficiaries preparatory to rendering judgment (40 C. Cls., 330 and 331), said:

> The persons to whom distribution of this fund of $1,111,284.70, with accrued interest, would be made if they were now living would be the communal owners of the Cherokee lands east of the Mississippi. By the tripartite treaty of 1846 the Western and Eastern Cherokees were placed on the same footing with re-

> gard to all lands east of the Mississippi and with regard to the funds derived from them. It follows necessarily that each and all of the present communal owners, whether on the east of the west of the Mississippi, and whether the descendants of Eastern or Western Cherokees, have the same individual interest in the fund and will be entitled to like amount *per capita*.
>
> A decree will be entered in this case following the form of that which was entered in the case of *Whitmire, trustee*, v. *Cherokee Nation*. (30 C. Cls. R., 180.)

The decree in the Whitmire case directed that the judgment, after certain deductions, should be "paid and distributed to the freedmen, free colored persons, and their descendants aforesaid entitled thereto, not to exceed the sum of $256.34 per capita, subject to the fees of counsel and other costs and expenses herein provided for, the expense of said commissioner and costs of such distribution likewise being a charge upon this fund and amount decreed in favor of the complainants herein, and the same shall be deducted therefrom by said Secretary of the Interior."

After rendering the judgment in the Eastern Cherokee case the Court of Claims directed that—

> The decree will also provide for the payment of the fund to the parties *per capita*, the charge of distribution likewise to be a charge upon the fund.

This court, in affirming the judgment of the Court of Claims (202 U. S., 128), cited with approval the language of Chief Justice Nott, who delivered the opinion of that Court:

> As to those Cherokees who remained in Georgia and North Carolina, in Alabama and Tennessee, they owe no allegiance to the Cherokee Nation and the nation owes no political protection to them. But they, as communal owners of the lands east of the Mississippi, at the time of the treaty of 1835, were equally interested, with the communal owners who were carried to the west, in the $5,000,000 fund which was the consideration of the cession, so far as it was to be distributed *per capita*.

In concluding its opinion this court, after quoting an extract from the petition of the Eastern and Emigrant Cherokees, said they have "asked that one-fourth part of the whole sum recovered be set apart for them as their distributive share. But we think they are only entitled to receive the *per capita* payment with the Eastern Cherokees, and should obtain that payment accordingly."

The language, it will be observed, has been used in the present tense: "*Are* only entitled to receive the *per capita* payment;" but independently of that fact the language can not relate back to the roll of 1851 and the *per capita* payments of 1851 and 1852, because they were not, as we have already shown, the equivalent of *per stirpes* payments.

## CONCLUSION.

In conclusion, we submit that the writ of mandamus prayed for should be denied upon the following grounds:

First. Because the attorneys who filed the petition had no authority to institute the suit.

Second. Because the petitioners, if they ever had any rights, have lost them by failure to institute and prosecute this suit in time.

Third. Because the mandate of this court directed a *per capita* distribution of the judgment.

JOHN Q. THOMPSON,
GEO. M. ANDERSON,
*Attorneys for the Court of Claims.*

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# MATTER OF EASTERN CHEROKEES, PETITIONERS.

## PETITION FOR WRIT OF MANDAMUS.

No. 15, Original. Argued February 20, 1911.—Decided March 20, 1911.

Mandamus to Court of Claims to require it to modify its decree to conform to a decree of this court and make a distribution *per stirpes* instead of *per capita* refused on the ground of laches.

Where the Court of Claims decrees a distribution *per capita*, parties who feel aggrieved thereby, and claim that the distribution should

be *per stirpes* in order to conform to the decree of this court, are not obliged to await the completion of the rolls on which the distribution is to be made. They can apply at once to this court for mandamus, *Re Sandford Fork & Tool Co.*, 160 U. S. 247, and are chargeable with laches if they wait and permit all the steps to be taken at great expense and the fund disbursed, so that in case of their success the Government might be required to pay twice; and so *held* in this case.

THE facts, which involve the distribution of a fund between Cherokee Indians pursuant to decrees of this court and of the Court of Claims, are stated in the opinion.

*Mr. John B. Daish*, with whom *Mr. Joseph D. Sullivan* was on the brief, for the petitioner.

*Mr. George M. Anderson*, with whom *Mr. John Q. Thompson* was on the brief, for the respondent, the Court of Claims.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition for mandamus to the Court of Claims to require it to conform to a decree of this court modifying a decree of that court in the case of the *United States* v. *Cherokee Nation*, 202 U. S. 101.

A rule to show cause was issued, to which a response has been made by the Court of Claims.

A recitation of the facts of the litigation between the Eastern Cherokees and the United States need not be made. They are set out in 202 U. S. 101. We are only concerned with the decree and what took place in accordance with it in the Court of Claims. It is enough to say that the Eastern Cherokees under the authority of acts of Congress brought suit against the United States for certain sums alleged to be due under treaties with the United States, and the Court of Claims decreed May 18,

1905, that, after deducting counsel fees, costs and expenses, the sum of $1,111,284.70, among other sums, with interest, should be paid to the Secretary of the Interior, to be by him received and held for the use and purpose of paying costs and expenses as stated, and the remainder to be distributed "directly to the Eastern and Western Cherokees, who were parties to the treaty of New Echola, as proclaimed May 23, 1836, or to the treaty of Washington of August 6, 1846, as individuals, whether east or west of the Mississippi River, or to the legal representatives of such individuals."

We held that the decree, "in directing that the distribution be made to 'the Eastern and Western Cherokees' " was "perhaps liable to misconstruction," though limited by a reference to the treaties, and decided that the decree should be modified "so as to direct the distribution to be made to the Eastern Cherokees as individuals, whether east or west of the Mississippi, parties to the treaties of 1835–36 and 1846, exclusive of the Old Settlers." As modified, the decree was affirmed.

We also decided that the amount of the decree "should be paid to the Secretary of the Interior, to be distributed directly to the parties entitled to it."

Upon the going down of the mandate the Court of Claims modified its decree, as directed, by explicitly excluding the Old Settlers in terms from its operation and distributing the fund "to the Eastern Cherokees as individuals," omitting the words "or to the legal representatives of such individuals." And the court directed the Secretary of the Interior to prepare or have prepared a roll of the Cherokees entitled to share in the amount of the decree and to "accept as a basis for the distribution of said fund the rolls of 1851, upon which the *per capita* payment to the Eastern Cherokees was made, and make such distribution in pursuance of article 9 of the treaty of 1846."

It is stated in the response of the Court of Claims to the rule to show cause that the special agent appointed by the Secretary encountered difficulties in making up the roll "upon a *per capita* basis and otherwise," and that the Secretary of the Interior called the attention of the court to the difficulties and asked the following questions: "First. Shall the rolls of 1851 be used as the exclusive basis for the present distribution? Second. Shall the distribution be *per stirpes* or *per capita*? Third. If *per capita*, what disposition shall be made of those portions for which there have been no applications?"

The court, considering that its decree, as modified by our mandate, directed a *per capita* distribution, ordered the commissioner named for the purpose to "enroll as entitled to share in the fund arising from said decree of May 28, 1906, all such individual Eastern Cherokee Indians by blood, living on May 28, 1906, as shall establish the fact that they were members of the Eastern Cherokee tribe of Indians at the date of the treaties of 1835–36 and 1846, or are descendants of such persons, and who shall further establish the fact that they have not been affiliated with any tribe of Indians other than the Eastern Cherokees or the Cherokee Nation."

The court subsequently (as appears from its response to the rule to show cause), "at the written request of the Secretary of the Interior and sundry other persons who petitioned therefor, as well as at the request of counsel engaged in said cause," vacated the order which directed the Secretary of the Interior to prepare the roll, and employed Guion Miller, who had theretofore been employed by the Secretary, to prepare the roll under its supervision. The roll was prepared as directed, to which exceptions were filed, most of which were overruled, and on March 7, 1910, it was approved.

Miller was also designated as a special commissioner to receive from the Treasury Department all the warrants

for the persons enrolled, and to visit the various localities where the Indians resided, as he had done in preparing the roll, and to deliver the warrants, which he did prior to the filing of the petition herein for mandamus, the response of the court stating as follows:

"The money arising from said judgment was long prior to October 17, 1910, the date of the filing of said petition for said mandate to show cause, distributed and paid to practically all of those on said roll, so that of the 30,827 enrolled only 313 remained unpaid, as we are advised by said commissioner, who was also intrusted, under the order of the court, with the delivery of the warrants issued by the Treasury Department to the parties so enrolled, respectively. Since which time 44 additional payments have been made, leaving 269 unpaid on October 28, 1910."

The court further states that on the authority of the special report of Miller, made for its information, persons of the same name as those signing the power of attorney authorizing the filing of the petition for mandamus were enrolled, as were those whom they claimed to represent, and have been paid their respective shares, for which they receipted in full.

It is contended by petitioners that the treaties of 1835–36 and 1846 required the Court of Claims to make a distribution *per stirpes*, and that in its original decree of May 18, 1905, it was so provided. And, it is further contended, that the mandate of this court so required, and that such interpretation was put upon it by the Court of Claims and the commissioner appointed by the Secretary of the Interior. It is insisted that, in consequence of the error of the court, the roll prepared in accordance with its orders contains the names of numerous persons not entitled under the mandate of this court to participate in the fund.

The respondent opposes these contentions and makes

the counter one that petitioners have been guilty of laches, which, if it be justified, makes a notice of other contentions unnecessary. A summary of the proceedings shows that the contention is justified. The first decree of the court, as we have seen, distributed the fund to the Eastern and Western Cherokees *as individuals, or to the legal representatives of such individuals.* The decree, as modified by this court, limited the distribution to the Eastern Cherokees, and omitted the words "or to the legal representatives of such individuals." A question arose as to whether the mandate of this court directed a *per capita* or *per stirpes* distribution, and, on March 5, 1907, the Court of Claims gave notice that it would hear the parties on the question.

The matter came on for hearing April 8, 1907, all parties being represented, and a *per capita* distribution of the judgment was ordered and a commissioner appointed to prepare the roll of those entitled to share under the decree.

This was done, and a report made to the court, to which exceptions were filed, which "in the main" were overruled. On March 10, 1910, the report as corrected was approved, and the amount of the decree distributed, as we have seen, to the persons entitled thereto.

This summary demonstrates the laches of petitioners. If it be conceded that the mandate of this court and the decree of the Court of Claims as modified in accordance with it were ambiguous, the Court of Claims decided, as early as April 28, 1907, that it required a *per capita* distribution. The petitioners took no action against the decision nor the order of distribution based on it. They permitted the distribution to be made. And they might have taken action. *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 259. Mandamus was available then, as now, and the circumstances condemn the delay. The amount of the judgment was to be distributed among

many thousands of persons. Such persons were to be ascertained, their names enrolled, and payment made to them. Every step involved expense, and the fund, once disbursed, could not be recovered, and the United States might be required to pay a second time.

In explanation of these circumstances, which, on their face, make a clear demonstration of negligence on the part of petitioners, they urge that after the modification on April 28, 1907, of the final decree there were other proceedings, instancing as such the ruling, on March 7, 1910, on exceptions to the roll, and urge that "within eighty-five days thereafter" they "secured counsel and invoked the jurisdiction of this court for the protection of their rights." They further urge that "until the roll had been approved there was uncertainty what the Court of Claims might do," and that "when the final order had been taken the petitioners were then only at liberty to institute the present proceeding."

This overlooks that they attack the principle upon which distribution was decreed by the Court of Claims; in other words, their contention is that a *per capita* instead of a *per stirpes* distribution of the fund was directed by the decree of April 28, 1907, the consequence of which was that "numerous persons not entitled under the mandate of this court" were made participants in the fund and their (petitioners') shares thereby "much lessened." Petitioners are mistaken, therefore, when they say that they were "only at liberty to institute the present proceeding" when the roll was approved. The decree constituted their grievance, if they had any, and if it did not execute the mandate of this court the action of the Court of Claims in rendering it could have been reviewed and corrected by appeal or mandamus. *In re Sanford Fork & Tool Co., supra.*

*Rule discharged and petition dismissed.*